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SACEP / UNEP / NORAD
REGIONAL SYMPOSIUM ON THE ROLE OF THE JUDICIARY
IN PROMOTING THE RULE OF LAW
IN THE AREA OF SUSTAINABLE DEVELOPMENT

Colombo, Sri Lanka
4-6 July 1997

COMPENDIUM OF SUMMARIES OF JUDICIAL DECISIONS IN ENVIRONMENT RELATED CASES

(With Special Reference to Countries in South Asia)

Published by:
South Asia Co-operative Environment Programme (SACEP) and
United Nations Environment Programme (UNEP)
with financial support from
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Tuyển tập của NORAD/UNEP/SACEP về Chính sách và Luật Môi trường - Ấn phẩm số 3

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CỦA TOÀ ÁN TRONG VIỆC THÚC ĐẨY LUẬT PHÁP
TRONG LĨNH VỰC PHÁT TRIỂN BỀN VỮNG

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(Đặc biệt dẫn chiếu đến các nước Nam Á)

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(With Special Reference to Countries in South Asia)

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FOREWORD

It gives me much pleasure to write a Foreword to the *Compendium of Summaries of Judicial Decisions in Environment Related Cases.* This *Compendium* is the result of the SACEP/UNEP/NORAD Symposium held in Colombo, Sri Lanka from 4-6 July 1997.

That Symposium brought together superior court judges from the SAARC countries to discuss their experiences in the field of environmental law, and to exchange ideas on an area of law which is of vital importance to the region. It resulted in a fruitful discussion of possible conceptual and procedural advances. Some of these were totally new ideas, and others were imaginative developments based on past experience. Well tried and traditional legal ideas can sometimes prove unequal to the handling of unprecedented problems, and they need to be developed with wisdom and sensitivity. At this Conference, the vast learning and experience of the assembled judges blended with their wisdom and sensitivity to the cultures and traditions of the region. The result was a rich crop of ideas for forging pathways through the challenging new terrain of environmental law.

Environmental problems put the judiciary upon their mettle, not only by virtue of their novelty, but also by virtue of their urgency and their widespread effect. When all other resources fail, the victims turn to the judiciary for redress, but the reservoir of legal principles we have inherited from the past will often be found inadequate, because the problems encountered are of an altogether new order.

The Conference revealed that the judiciary of the SAARC region is in the vanguard of judicial efforts to come to terms with these problems. Indeed, participants at the Conference, hailing from

regions as far afield as America and Australia, observed that the judiciary in the SAARC countries probably leads the world in this field.

This is encouraging, and a spur to greater effort. Our region is often at the receiving end of pollutants and deleterious substances of all kinds that emanate from other jurisdictions and find their way eventually into destinations in our countries. They pose a variety of problems in which, for lack of precedent, it is vital that the judiciary of one country should know whether the judiciary of another country in the region has been faced with a similar problem and, if so, how it has handled it.

This makes this *Compendium* invaluable and, now that this publication has appeared, it can only be hoped that it will be a stimulus to other compendiums and even to the emergence of environmental law reports for the region. This can lead to a collective judicial effort which can be productive of the most far reaching results, not only for our judiciaries, but for the rest of the world.

In the procedural area, we need to know how environmental courts can be set up, or special environmental jurisdictions created, how class actions and public interest litigation can be encouraged, how public participation can be stimulated, and how the vexed problem of standing, which has been such a barrier in the way of environmental actions, can be more imaginatively handled. How can a court issuing an order such as a mandamus ensure that its order continues to be complied with? Who is a "person aggrieved" and what is a "sufficient interest"? What committees of experts can be called in to aid the court, how can they be set up, and what is the reporting procedure they should adopt? These are vital areas where the legacy of the past affords little guidance for the future. Our judges urgently need information on judicial initiatives taken in one country which can act as a catalyst to legal thought in another.

At the conceptual level, how have our courts used constitutional provisions and human rights to help in developing a body of environmental protections and principles? The concept of intergenerational equity, in which the traditions of our region teem with far-reaching ideas, throw out a challenge to our courts to draw upon the past wisdom of our region to help in fashioning our future protections. Environmental Impact Assessment is in need of judicial development to suit the particular needs of our region. So are such developing principles of environmental law as the "Polluter Pays Principle" and the Precautionary Principle. What environmental protections can be fashioned out of the right to know, and how have our courts been able to help develop the public trust doctrine?

Since public awareness is an important means of containing environmental damage, to what extent can the courts interpret constitutional principles to further environmental education?

This is but a small sampling of the sort of inquiry to which some answers and keynote ideas can be found in this *Compendium.*

Nuclear weapons, dangerous waste, deleterious chemicals, wildlife, fishing zones, fauna protection, watercourses, mining operations, minefields, noise pollution - the areas are varied which the cases in this *Compendium* have handled.

I congratulate the editors on this publication, and I congratulate SACEP/UNEP/NORAD for their vision in taking the initiatives which have made this possible.

This volume, hopefully the precursor of others to follow, will be a useful guide to all the judiciaries of the region in the discharge of the heavy responsibilities that will increasingly devolve upon them in the environmental area. It is to be hoped it will foster international judicial dialogue in the region, inspire the judiciary with new enthusiasm, and provide an overarching vision of what collective thought and action can achieve in an area of such

momentous importance to the human future. It will help in building up the necessary judicial initiatives to meet these problems which are without precedent in the long annals of the law.

Christopher G. Weeramantry
Vice President, International Court of Justice

INTRODUCTION

This publication has been developed from a background document prepared for the Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development, which was held in Colombo, Sri Lanka from 4-6 July, 1997. The Symposium was organised jointly by the South Asia Co-operative Environment Programme (SACEP) and the United Nations Environment Programme (UNEP) with funding from the Norwegian Agency for Development Co-operation (NORAD).

The objective of the Symposium was to review the role played by the Courts of Law especially in the South Asian countries, in developing this new branch of jurisprudence, and to establish a regional network of, among others, Judges and Lawyers in the region for the expeditious and effective dissemination of legal information on environment and development, including judicial decisions.

The Courts of Law at both national and international levels, have served to illuminate the emerging norms and principles of law associated with the new concept of sustainable development, and have given direction to national and international efforts to promote sustainable development. It is widely recognised that Courts in South Asia have provided inspiring leadership to this process, and thus given reassuring hopes to the public and individual citizens. Telling evidence of this will be found in the many judgements from South Asian Judiciaries included in this Compendium.

Having regard to the importance of the subject, the Symposium attracted participation at the highest level from South Asian Countries and from elsewhere. The Moderator of the Symposium was His Excellency Judge Christopher G. Weeramantry, Vice-President of the International Court of Justice at the Hague. Hon. Mr. Justice P.N. Bhagwati, former Chief Justice of India, who

served as Advisor to SACEP and UNEP in its organisation was unfortunately unable to attend, as he was taken ill on the eve of the Symposium. Hon. Mr. Justice A.R.B. Amerasinghe, Judge of the Supreme Court of Sri Lanka served as the Secretary-General of the Symposium. Among those who presented papers at the Symposium were the Chief Justice of Bangladesh, His Excellency Justice A.T.M. Afzal, the Chief Justice of Nepal, His Excellency Justice Trilok Pratap Rana, Hon Justice Raja Afrasiab, Judge of the Supreme Court of Pakistan, Hon. Justice B. N. Kirpal, Judge of the Supreme Court of India, Hon. Justice Mark Fernando, Judge of the Supreme Court of Sri Lanka, Hon. Sarath N. Silva, Attorney General of Sri Lanka, Hon. Abdullahi Majeed, Deputy Minister of Planning, Human Resources and Environment of the Maldives, Mr. Donald Kaniaru, Director of the Environmental Law and Institutions Centre (ELI/PAC) of UNEP, Hon. Justice Paul Stein, Judge of the Court of Appeal, New South Wales, Australia and former Judge of the Land and Environmental Court of NSW, Mme. D. Beesoondoyal, Chair, Environmental Appeal Tribunal of Mauritius, Professor Nicholas A. Robinson, Chair, IUCN Commission on Environmental Law, and Prof. Mohan Munasinghe, Senior Adviser on Sustainable Development at the World Bank. The Report of the Symposium will be released shortly.

The summaries of the judgements included in the Compendium have been prepared with a view to providing an overview of the thrust of judicial decisions, especially in the South Asian countries on environmental matters. It is our hope that this Compendium will contribute to promoting the use of law as a key instrument in the translation of environment and development policies into action at national and international levels. The purpose of the Publication is principally to provide in an easily readable way, a flavour of the trend in recent judicial decisions that have dealt with environmental and developmental issues from different jurisdictions in South Asia and beyond. The full texts of the judgements are available with the Secretariats of SACEP and UNEP and are currently being prepared for publication under the SACEP/UNEP/NORAD Environmental Law and Policy

Publications Series, following the recommendations of the Symposium. These publications are expected to be released in late 1998.

The Editors wish to add an important note of caution. Almost every judgement included in this Compendium deals, as will be expected, with the a wide range of factual and legal issues, many of which are not of particular relevance to the subject of the Symposium, and therefore, this publication. The summaries only highlight the essential features of the judgements in so far as they relate to environmental issues, and have been kept as brief as possible in keeping with the objectives of the publication. Every effort has, however, been made - often by using the language of the judgement itself - to ensure that the summaries accurately reflect the decision of the court and its reasoning. A subject index and an Appendix containing relevant provisions of the Constitutions of the South Asian countries have been included to facilitate reference and a fuller appreciation of the important role that Courts in the South Asian region have played in interpreting Constitutional rights.

The Symposium and this publication are the result of an excellent inter-agency partnership that was established in 1996 between SACEP and UNEP, which has recently been further consolidated by a Memorandum of Understanding between the two organizations that was entered into in December, 1997, to collaborate with countries in South Asia in the development of their national environmental laws. Under this Programme, funded by the Royal Norwegian Government through NORAD, action on country programmes have been initiated in Bangladesh, India, Nepal, Maldives and Sri Lanka. Programmes will be initiated shortly in Bhutan and Pakistan. Among the regional programmes being carried out under this Joint SACEP/UNEP/NORAD Programme are the Judges Symposium, a regional training programme held in Maldives in April 1997 on the implementation of major environmental conventions, and several environmental law publications geared to the particular needs of countries in South Asia.

SACEP and UNEP have played and continue to play a crucial catalytic role in the promotion of sustainable development in the South Asia region. SACEP has, since it was set up as a South Asian intergovernmental organisation to provide a regional focus on environmental issues of special significance to the countries in this region, carried out several programmes to assist in the strengthening of the national and regional capabilities in the area of environment and development. Among these are the Development of a Curriculum for Regional Training for the Management of Protected Areas and Coral Island Ecosystems in South Asia, the Assessment of Biodiversity in the South Asian Countries and the Training in the area of Environmental Management. SACEP, with assistance from UNEP and the Asian Development Bank has also set up a SACEP Environmental Natural Resources Information Centre (SENRIC). In recognition of the major role that SACEP has played in promoting regional co-operation in environmental matters, it was recently made the Secretariat for UNEP's Regional Seas Programme for South Asia. SACEP would also be implementing the South Asian segment of the Global Programme of Action on Land Based Sources of Marine Pollution.

UNEP has for over 25 years been providing leadership to the development of several major global and regional environmental Conventions. Among them are the Global Convention on Ozone Depletion and its Montreal Protocol, the Conventions on Biodiversity, Migratory Species, Illegal Trade in Wild Fauna and Flora, and the Basel Convention on the Transboundary Movement of Hazardous Wastes. Its regional network of Conventions cuts across all oceans and seas and the protection of wildlife. Acting as Secretariats for five major global conventions, UNEP has also played a pivotal role in the negotiation of the Climate Change and Desertification Conventions.

At national level, UNEP has assisted over seventy countries in Asia and the Pacific, Africa, and Latin America with the strengthening of national environmental legislation which will provide a basis for the integration of environment in development decision making. Its capacity building activities include the

conduct of global, regional and national environmental law training programmes, and the publication of environmental law compilations of practical use to those engaged in the development and implementation of environmental law and policy, especially in developing countries.

The Editors wish to express their appreciation to several individuals and institutions who provided copies of the texts of judgements of the superior courts for the development of the summaries that have been included in this Compendium. While it is not possible to thank them all individually, special mention must be made of Professor Rahmathullah Khan, Jawaharlal Nehru Professor of Environmental Law at the Jawarhalal Nehru University in New Delhi, India; Dr. Mohiuddin Farooque, Secretary-General of the Bangladesh Environmental Lawyers Association (BELA); and the IUCN Country Office in Pakistan for providing copies of several judgements from India, Bangladesh and Pakistan respectively, summarised in this Compendium. We are also most grateful to the participants of the Regional Symposium who provided copies of recent judgements from their respective jurisdictions. We extend our deep appreciation and gratitude to Mr. Mohan Prabhu Q.C. for providing us the summaries of Canadian judgements, which had been prepared by him in his capacity as the Rapporteur of the Workshop on Crimes Against the Environment of the Ninth United Nations Congress on the Prevention of Crimes and the Protection of Offenders.

There are many who have helped in the development of this Compendium reading through long and often very complex judgements and highlighting their environmental aspects, which considerably lightened the task of the Editors in preparing the summaries. In this connection, special mention must be made of the contribution made by a team of lawyers led by Senior State Counsel in the Attorney General's Office of Sri Lanka, Mrs. Bimba Tillekeratne and Miss Anusha Navaratne, and the Environmental Lawyers attached to the UNEP Regional Office for Asia and the Pacific, Ms. Clare Cory and Mr. Chad Martino,

and interns Mr. Brian Cheng and Mr. Douglas Tookey, who assisted in the preparation of the summaries, the subject index and the Appendix, and to Mr. Pradeep Kurukulasuriya and Ms. Chandima Jayasuriya of SACEP, Colombo who prepared the text for publication.

Donald Kaniaru

Lal Kurukulasuriya

Prasantha Dias Abeyegunawardene

Editors

3rd December, 1997

INDEX BY SUBJECT MATTER

(Case numbers as listed in the Table of Contents)

LIST OF ABBREVIATIONS

AIR	All India Reports
BELA	Bangladesh Environmental Lawyers Association
CCC	Canadian Criminal Cases
CEA	Central Environment Authority (Sri Lanka)
CEB	Ceylon Electricity Board
CELR	Canadian Environmental Law Reports
DENR	Department of Environment and Natural Resources (Philippines)
DLR	Dhaka Law Reports
EIA	Environmental Impact Assessment
EPA	Environmental Protection Agency (U.S.)
EPL	Environment Protection License
EQA	Environmental Quality Act (Malaysia)
FHWA	Federal Highways Administration (U.S.)
ICJ	International Court of Justice
JICA	Japanese International Co-operation Agency
LGERA	Local Government Environmental Reports of Australia
NEA	National Environment Act (Sri Lanka)
NEPA(1)	National Environmental Protection Agency (Australia)
NEPA(2)	National Environmental Protection Act (U.S.)
NSW	New South Wales
OWP	Originating Writ Petition
PAA	Project Approval Authority (Sri Lanka)
PCB	Polychlorinated Biphenyls
PS	Pradeshiya Sabha (Sri Lanka)
QPP	Quebec Provincial Police
SACEP	South Asian Co-operative Environment Programme
SAARC	South Asian Association for Regional Co-operation
SAELR	South Asia Environmental Law Reports
SCC	Supreme Court Cases (India)
TEC	Technical Evaluation Committee
UNEP	United Nations Environment Programme
WHO	World Health Organization

SECTION I

SOUTH ASIA

PART A

BANGLADESH

DR. MOHIUDDIN FAROOQUE v. BANGLADESH, REPRESENTED BY THE SECRETARY, MINISTRY OF IRRIGATION, WATER RESOURCES & FLOOD CONTROL AND 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., AND 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, the ecological balance and an environment free from pollution essential for the enjoyment of the right to life.

Legal Framework

Interpretation of the expression " any person aggrieved" in Article 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 move 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 made by 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)

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

The Petitioner, Dr. Mohiuddin Farooque, Secretary-General of the Bangladesh Environmental Lawyers Association (BELA), 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.

Petitioner argued that vehicles on Dhaka's roads did not comply with the required fitness standards, and that they emitted smoke harmful to humans. He also argued that the use of prohibited horns and audible signalling 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.

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 aggravate if a multi-storey building was allowed to be constructed 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, 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 Respondents Nos. 1 and 5 in the public car park should not be declared to have been undertaken unlawfully, against public interest and without lawful authority.

BANGLADESH ENVIRONMENTAL LAWYERS ASSOCIATION v. THE ELECTION COMMISSION AND OTHERS

SUPREME COURT OF BANGLADESH
High Court Division
WRIT PETITION NO. 186 OF 1994
M.I.U. SARKER, J. AND J.K.E. HOQUE, J.

Introduction

The petitioner, Dr. Mohiuddin Farooque, Secretary-General 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. Petitioner asked that these candidates be required to comply with 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."

PART B

INDIA

M.C. MEHTA v. KAMAL NATH AND 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 held that prior approval for the additional leasehold land, given in 1994, is quashed and the Government shall take over the area and restore it to its original condition. Span Motels will pay compensation to restore the environment, and the various constructions on the bank of the River Beas must be removed and reversed . Span motels must 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 shall construct a boundary wall around the area covered by this lease, and Span Motels shall not encroach upon any part of the river basin. In addition, this motel shall not discharge 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 how 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 uses.

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Sacco v. Development of Public Works 532 Mass 670
State v. Public Service Commission 275 Wis 112

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

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

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

"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

(1) Notice to all the State Governments and the State Pollution Control Board 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, 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 to be banned hereafter, with effect from the date specified therein.

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 immediate order be not made for the closure of all unauthorised hazardous wastes handling units.

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

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 stop 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 aquafiers 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.

Legislative 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.

Respondents generated this waste without the requisite clearances/consent/license, 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 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) 5 Scale 578

Pravinbhai Jashbhai Patel v. State of Gujarat (1995) 2 GLR 1210: (1995) 2 GLH 352

Cambridge Water Co. v. Eastern Counties Leather, pl 2 WLR 53: (1994) 1 All ER 53

Burnie Port Authority v. General Jones Pty Ltd (1994) 68 Aus LJ 331

Union Carbide Corp. v. Union of India (1991) 4 SCC 584

M.C. 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

M/S AZIZ TIMBER CORP. AND OTHERS v. STATE OF JAMMU & KASHMIR THROUGH CHIEF SECRETARY AND 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 May 10, 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 license/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 August 9, 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.

Petitioners subsequently challenged the August 9, 1996 order in the High Court of Jammu and Kashmir, stating that they had licenses for logging and were registered for the sale of timber. They also claimed that this order deprived them from carrying on

their trade. On August 20, 1996 a single judge of the High Court of Jammu and Kashmir stayed the order of August 9, 1996.

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

On October 24, 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 August 20, 1996 interim order by the High Court of Jammu and Kashmir, and stated that the May 10, 1996 order superseded this order.

Legislative 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 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 May 10, 1996 order of the Supreme Court of India will be carried out.

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

VELLORE CITIZENS WELFARE FORUM v. UNION OF INDIA

SUPREME COURT OF INDIA
AIR 1996 SC 2715
KULDIP SINGH, J., FAIZAN UDDIN, J., and K. VENKATASWAMI, J.

Introduction

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, waterways, 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.

Legislative 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 news 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)

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 and 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 said 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.

M.C. MEHTA v. UNION OF INDIA AND 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 51A(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 licenses 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 license.

(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 programs 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.

As far as 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 is required for the next academic year.

SUBASH KUMAR v. STATE OF BIHAR

AIR 1991 SC 420
K.N. 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 resorted 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.

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 and 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.

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.

CHHETRIYA PARDUSHAN MUKTI SANGHARSH SAMITI v. STATE OF U.P. and others

AIR 1990 SC 2060
SABYASACHI MUKHARJI, C.J. and K.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.

Legislative 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 relevant Act, namely the Air Pollution Control Act have been complied with and there is 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 SCR 279:
AIR 1988 SC 1037
AIR 1988 SC 1037
AIR 1984 SC 802

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 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.

Legislative 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.

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 judgement of the Madhya Pradesh High Court, both of which were heard together.

Damages were sought on behalf of victims of Bhopal gas leak disaster. The Court examined the *prima facie* material for the purpose of quantifying the damages, and also 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

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.

Legislative 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
Jeffers 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
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AIR 1952 SC 149: 1952 SCR 425: 1952 Cri Lj 832(1931) 284 IS 299:
Blockburger v. United States 76 Law Ed 306

CALCUTTA YOUTH FRONT v. STATE OF WEST BENGAL

1988 SC 436
A. P. SEN and 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

Legislative 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. It was also held that the implementation of the development

Cases Cited

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

DR. SHIVA RAO, SHANTA RAM WAGLE and others v. UNION OF INDIA and 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 judgement and order of the High Court of Bombay, declining to issue a Writ of Mandamus, to restrain 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.

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.

Legislative Framework

Articles 48A and 51A(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

M.C. MEHTA v. UNION OF INDIA and others

AIR 1988 SUPREME COURT 1037
E.S. VENKATARAMIAH and K.N. SINGH JJ.

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 judgement:

"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.

M.C. MEHTA v. UNION OF INDIA and others

AIR 1988 SUPREME COURT 1115
E.S. VENKATARAMIAH and K.N. 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.

Legislative 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 judgement 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

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 ecology of the region and caused environmental damage, to be registered as a writ petition under Article 32 of the Constitution, and issued notice on the Respondents.

Legislative 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 1987 SC 2426
AIR 1985 SC 652
AIR 1985 SC 814

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.

AMBICA QUARRY WORKS v. STATE OF GUJARAT and others

AIR 1987 SC 1073
SABYASACHI MUKHARJI and 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.

Legislative 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

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"

M.C. MEHTA AND OTHERS v. SHRIRAM FOOD and FERTILIZER INDUSTRIES and 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.

M.C. MEHTA and others v. SHRIRAM FOOD and FERTILIZER INDUSTRIES and 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 and 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 issue 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(1) 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.

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

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 19(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 (1)(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

THE MEMBER-SECRETARY, KERALA STATE BOARD FOR PREVENTION & CONTROL OF WATER POLLUTION, KAWADIAR, TRIVANDRUM v. THE GWALIOR RAYON SILK MANUFACTURING (WEAVING) COMPANY, LTD., KAZHIKODE and 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

Derby and Derbyshire Angling Association Ltd. v. British Celanese Ltd. (1953) 1 Ch. 149 p.191.

AIR 1986 SC 649

RABIN MUKHERJEE and others v. STATE OF WEST BENGAL and 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.

Legislative 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.

RURAL LITIGATION AND ENTITLEMENT KENDERA v. UNION OF INDIA (DOON VALLEY LIMESTONE QUARRYING CASE -II)

AIR 1985 SC 652
P.N. BHAGWATI C.J. and 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

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 Bandyopadhyay 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

TEHRI BANDH VIRODHI SANGARSH SAMITI and others v. THE STATE OF UTTAR PRADESH and others

SUPREME COURT OF INDIA
WRIT PETITION NO. 12829 OF 1985
K.N. 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 will pose a serious threat to the life, ecology and the environments of the entire northern India.

Legislative Framework

Constitution of India –Article 32.

Held

The Court sated 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.

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".

PART C

PAKISTAN

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 against the pollution of the 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 grant of mining leases in the area was 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 polluted the reservoir creating a health hazard, and that the allotment and grant of leases for mining in the catchment area was illegal and mala-fides, and prayed for cancellation of licenses.

Legislative 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 violation or 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 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 licenses 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

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 license 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/license/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.

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 - 10 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.

Legislative 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 which 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, should 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 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, 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 180)
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 U.P. and others (AIR 1985 SC 652)
Shri Sachidanand Pandey and another v. the State of West Bengal and others (AIR 1987 SC 1109)
M.C. Mehta v. Union of India (AIR 1988 S.C. 1115)
M.C. Mehta v. Union of India (AIR 1988 S.C. 1037)

PART D

SRI LANKA

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

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.

Legislative Framework

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

Held

The Acting Secretary, 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 the noise levels of the industry should be checked by an independent body. 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 proved, the CEA could cancel or suspend the EPL.

request a formal investigation, and if the violations were proved, the CEA could cancel or suspend the EPL.

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, Ministry of Environment considered to reach this 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 as well as others were not

given adequate consideration in the EIA. The TEC recommended that other alternatives in the EIA be considered further. The PAA, however, went ahead and approved the UKH project, in spite of the TEC's recommendation.

Legislative Framework

Section 23DD National Environmental Act.

Held

The Secretary, 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.

CEB's EIA of this project is seriously flawed because it does not adequately address itself to alternatives to the project, and has 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 leaves the decision-maker in doubt whether the chosen alternative is environmentally, financially and technically the better option.

In addition, it appears 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.

This appeal is dismissed, and CEB is free to seek approval for this project with an EIA that addresses the concerns of this opinion. If CEB does 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. 1971)
Libby Rod and Gun Club v. Potcat 8 ELR 20807
Sierra Club v. Callaway 499 F.2d 982 (5th Cir. 1974)

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) appeals against the decision of the Poojapitiya Pradeshiya Sabha (the PS) cancelling the Environmental Protection License (EPL) issued to him under Section 23B of the National Environmental Act. Niyaz operates a saw mill, and the EPL covers 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.

Legislative 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 license 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 is 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

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, appeals against the decision of the Divulapitiya Pradeshiya Sabha (PS) denying him the virtue of 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 license for such brick kilns to the PS.

In a related litigation, 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 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.

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 a 30 foot chimney. CEA explained that as the Negombo Magistrate's Court had imposed the 200 metre limit on Appellant's father, CEA would impose this limit on 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. 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.

Legislative 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 he has jurisdiction to entertain this appeal, as the site clearance application is a pre-EPL procedure. This site clearance 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 license, even before an application has formally been made, this is 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 meter

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 will 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 meter distance between brick kilns and residences, subject to variation in exceptional circumstances, is 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 is set aside. Appellant is free to make a formal EPL application. The new 100 metre limit will 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.

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, 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.

Legislative 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 is headed with the word "Appeal" and states that it disagrees with some aspects of the PAA's decision and agrees 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

requires holding that RHL's letter is 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 PAA has 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 reveals 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 create such situations where a *per se* approval (or disapproval) of a project is not possible.

If the PAA's decision substantively altered 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 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.V. Nambudiri v. A.N. Kurup 1965 AIR (Kerala) 1

THE ENVIRONMENTAL FOUNDATION LIMITED AND OTHERS v. THE ATTORNEY-GENERAL AND 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., AND P. RAMANATHAN, J.

Introduction

Petitioners include residents of Nawimana and Weragampita villages in the South of Sri Lanka, as well as a company which is devoted to environmental protection. In 1987 The Southern Group took over a rock quarry near Petitioners' villages. Petitioners allege that they have 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, Petitioners state that pieces of rock 20 centimetres in diameter were projected onto their village, that the blasting created unbearable noise, severe vibrations and thick smoke, destruction of homes, and harm to their health and livelihoods.

Petitioners argued that despite their complaints, the Government Agent, Matara, renewed the license 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 license from the CEA, 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, 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 Petitioner's physical quality of life.

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 petitioners' representatives. In December 1992, the parties informed the Supreme Court that a settlement had been reached.

Legislative Framework

Articles 3, 11, 14, 126 of the Constitution of Sri Lanka.

Held

The settlement is approved, and the application is dismissed without costs.

The Court listed the terms of the settlement. The number of blastings 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 detonation and the safety fuse method must be used. The depth of a bore hole cannot exceed 8 feet. The number of blastings 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 shall include in the environmental protection license 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.

KEANGNAM ENTERPRISES LIMITED v. E.A. ABEYSINGHE and eleven 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, to be added as parties.

The Petitioner-Company sought revision of two orders of the Magistrate's Court of Kurunegala delivered respectively on 18.12.1991 and 26.03.1992 in the Court of Appeal. The Order delivered on 26.03.1991 merely affirmed after an *inter partes* inquiry, the order made *ex-parte* on 18.12.1991 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.

Legislative 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 license 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 license from the CEA. It had commenced blasting operations on 1.9.1991 on the strength of a letter dated 10.07.1991 from the Director, CEA, to the Kurunegala Pradeshiya Sabha which stated that an environmental protection license "shall be obtained by the developer" and that "the developer shall submit an application for the said license to the CEA one month prior to the commencement of manufacturing operations."

A permit was eventually issued to the Petitioner-Company on 19.06.1992 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 license 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 10.07.1991 from the Director, CEA. Since the Petitioner-Company was not in possession of a license 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 which they complained of. Therefore, the revision application would be dismissed. However, since the Petitioner Company had subsequently obtained a license 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)

S. C. AMARASINGHE and three others v. THE ATTORNEY GENERAL and three 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 21.10.1992 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 one "which would meet the just requirements of the general welfare of the people".

Legislative 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 has 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 Section 10(h) of 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

SECTION II

SOUTH EAST ASIA

PART A

MALAYSIA

KAJING TUBFK & ORS v. EKRAN BHD & ORS

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 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 environment protection can only be carried out with the approval of the Director General of environment quality, the 2nd 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 lists 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 1st 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 2nd defendant under S.34A of the Act, and the regulations made thereunder.

Legislative 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. 11A(1).
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 is 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 "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 is a removal of the entire rights of the plaintiff to participate and give their views before the EIA is approved.

Accordingly, the Court declared that the Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987, is 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) 2 MLJ 12.
Tan Sri Hj Othman Saat v Mohamed Bin Ismail (1982) 2 MLJ 177.
Ibeneweku v. Eqbuna (1964) 1 WLR 219.
Lonrho Ltd & Anor v Shell Petroleums Co. Ltd. & Anor (No.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 SF 2d 618,621.
Gouriet v Union of Post Office Workers & Ors (1977) 3 All ER 70)
Howe Yoon Chang v Chief Assessor Property Tax Singapore (1978) 2 MLJ 87
Chief Assessor Property Tax Singapore v. Howe Yoon Chang (1979)1 MLJ 207
R v. Secretary of State for the Home Department ex parte-Al-Mahdarni (1989)1 All ER 777.
Wong Pot Heng & Anor v Kerajaanen Malaysia (1992) 2 MLJ 885
Phillips v Eyre (1870) LR 6 QB1
Penang Development Corp. v Tech Eng Hvat & Anor (1993) 2 MLJ 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

PART B

PHILIPPINES

JUAN ANTONIO OPOSA and others v. THE HONOURABLE FULGENCIO S. FACTORAN and 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 prayed for an order directing the Secretary to the Department of Environment and Natural Resources (DENR) to cancel all existing timber license 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 inter-generational justice. The Petitioners led extensive scientific evidence to support their case that the widespread granting of timber license 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 licenses 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 that he holds 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-à-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 implead the holders of the questioned timber licenses 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

SECTION III

AUSTRALIA

PART A

NEW SOUTH WALES

GREENPEACE AUSTRALIA LTD v. REDBANK POWER COMPANY PTY. LTD. AND SINGLETON COUNCIL

LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES
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.

Legislative 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

NICHOLLS v. DIRECTOR GENERAL OF PRIVATE NATIONAL PARKS AND WILDLIFE and 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.

Legislative 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.

LEATCH v. NATIONAL PARKS AND WILDLIFE SERVICE AND SHOALHAVEN CITY COUNCIL

LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES
81 LGERA 270 (1993)
STEIN, J.

Introduction

This Appeal sought to challenge a license 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 1974 the Director General is empowered to issue licences 'to take or kill' endangered fauna. A license 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 judgement Stein J. observed that:

1. A license 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 license 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 license to "take or kill" the species until much more is known.

SECTION IV

OTHER COUNTRIES

PART A

CANADA

(The Summaries of the Canadian Judgements have been prepared by Mr. Mohan Prabhu, Q.C. Rapporteur of the Workshop on Crimes Against the Environment of the Ninth United Nations Congress on the Prevention of Crimes and the Protection of Offenders.)

R v. VARNICOLOR CHEMICAL LIMITED TRI UNION CHEMICAL OF ELMIRA AND SEVERIN ARGENTON, Director/Owner and Officers

(1992) 9 C.E.L.R. (N.S.) 177
ONTARIO PROVINCIAL COURT

The accused Companies, its director/owner and its officers in Ontario were charged for an alleged breach under the Environmental Protection Act for unlawfully discharging hazardous waste into the Environment. The company was given 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 PCB's. 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 test showed that ground water both on and off the site were greatly in excess of drinking water guidelines for various chemicals which are acutely and chronically toxic to humans, animals and fish. Some of the chemicals detected could cause injury to the nervous system. The hydrogeological report concluded that the contaminants detected will migrate with the ground water and may eventually discharge into creeks and hence to rivers from which water is taken by municipalities in the region for supplying to residents. Moreover, due to improper storage of liquid and hazardous wastes, fire safety violations had also been discovered.

Decision

The company was not fined as it went out of business. However, the owner was fined and sentenced to eight months imprisonment. The officer was fined Can$ 15,000 for clean up of the site.

R v. BATA INDUSTRIES LIMITED and others

(1992) 70 C.C.C. (3rd) 395
ONTARIO PROVINCIAL COURT

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 stages of decay. They were rusty, uncovered and leaking. Some of the chemicals were highly carcinogenic. It became evident that this process has been going on for several years. One of the directors who was charged, was an "on site" director of the accused company. Although the former had procrastinated in finding suitable waste haulers to dispose with the drums, it was found he had failed to establish that he had exercised all reasonable care to prevent unlawful discharge as required by law. He had seen the storage area accumulating in 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 director had been reminded of his responsibilities by the Technical Advisory Bulletins from the Bata Shoe Organisation.

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 and he had periodically reviewed the operations and performance goals of the facility.

It was also found that the Company president had failed to exercise due diligence. It was not sufficient that only 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 to fund a local toxic waste disposal program to pick up various household waste 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 inefficacious as the company simply had to wait out the period of probation and then indemnify the directors and further such a condition was found to be in conflict with a statutory provision in the Ontario Business Corporation Act.

R. v. BLACKBIRD HOLDINGS LIMITED and GEORGE CROWE, Controlling Shareholder

(1990) 6 C.E.L.R. (N.S.) 119
ONTARIO PROVINCIAL COURT

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, to purchase empty drums and remove and dispose of waste material from Goodyear's property. The accused 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 shall protect and save Goodyear from any fines or penalties provided for by federal, provincial, municipal or common law and that Burprom shall 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 the accused's property 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. Crowe's denial of any knowledge of how the drums got buried on his property was not believed by the trial judge. He also argued that the drums must have been actually buried during the time set out in the charge, i.e. May 1988 to January 1990.

The judge noted that the contaminants were human carcinogens and that extensive clean up would be needed at taxpayers' expense.

ATTORNEY GENERAL, QUEBEC v. MARK LEVY, LUBRIMAX (1982) INC. and D. M. TRANSPORT LTD.

JUDGEMENT 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.

R. v. TIOXIDE CANADA INC., TURCOTTE, ECKERSLEY, GAUTHIER, LACHANCE and COLLINGWOOD, Directors

(UNREPORTED)
QUEBEC COURT, 1993

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 to operate. In the final stages it did not have a formal authorisation 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 regulations.

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 which the accused initially complied with, 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 offending section of the plant was closed by the company.

The accused pleaded not guilty initially and elected 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 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.

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 like 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 Limited 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 as well as the standards that 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, making 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 charges, the second and fifteenth charge 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' the accused's non-compliance; and that the investments made to bring the mine into compliance were made after the offences occurred and charges laid.

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 plea bargaining 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 being 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 permit 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.

RE. SAUSE BROTHERS OCEAN TOWING CONCERNING AN OIL SPILL FROM THE BARGE 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, an American company. The oil spill left in its wake some 500,000 dead migratory birds and several dead sea otters and the oiling of numerous seals and sea lions. The shellfish and crab fisheries were closed and eel grass was destroyed.

In December 1988, when the oil spill occurred, 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 though the spill occurs outside 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. 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); to the NTC 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.

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 for 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 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, that very fact may be taken in aggravation in the proper case.

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."

PART B

CHILE

PEDRO FLORES Y OTROS v. CORPORACION DEL COBRE, CODELCO, DIVISION SALVADOR. RECURSO DE PROTECCION. COPIAPO

SUPREME COURT OF CHILE ROL.12.753.FS. 641 (1988)

Introduction

Chanaral is a small town 1,000 kilometres north of Santiago, Chile. For over fifty years, a mining company deposited its copper tailing wastes directly onto the beaches of Chanaral, destroying all traces of marine life in the area.

From 1939 to 1974, 220 million tons of waste were dumped into the Bay of Chanaral. From 1975 until the late 1980s, 126 million tons of waste where deposited in a nearby cove. A 1983 survey conducted by the United Nations Environment Programme listed Chanaral as one of the Pacific Ocean's most serious cases of marine pollution from industrial waste.

To halt further environmental degradation, a number of Chanaral residents and various organisations organised and initiated this suit.

Legislative Framework

Constitution of the Republic of Chile (1980) Articles 19 (right to live in unpolluted environment) and 20 (protection action to assure enforcement of the right to live in an unpolluted environment)
Industrial Waste (Law No. 3.133 (1916)) Law creating the Fishery and Hunting Advisory Committee (D.F.L. 208 (1953)).
Sanitary Code (D.F.L. 725 (1967)).
Navigation Law (D.L. 2.222 (1978)).
Fishery Law (D.F.L. 5 (1983))

Held

The Supreme Court of Chile enjoined Codelco from further activities damaging the marine environment of Chanaral. The Court of Appeals of Copiapo made a personal survey and report of the pollution at Chanaral. Through aerial and terrestrial inspections, this report concluded that the Chanaral coastline has been devastated by pollution from mining activities. The company has a one-year period, from the date of the decision, to put a definitive end to its dumping of mineral tailings into the Pacific Ocean. Codelco must build a dam to dispose of its wastes.

Cases Cited

Pedro Flores y otros v. Corporacion del Cobre, Codelco, Division Salvador. Recurso de Proteccion. Copiaco. Corte de Apelaciones 23.06.1988. Rol. 2.052

PART C

MAURITIUS

STE WIEHE MONTOCCHIO & CIE v. MINISTER OF THE ENVIRONMENT AND QUALITY OF LIFE

MAURITIUS ENVIRONMENT APPEAL TRIBUNAL (CAUSE NO. 2/95) D. BEESOONDOYAL (CHAIRPERSON), ALLY DOSSA, AND KRISHNA NIRSIMLOO

Introduction

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

Legislative 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 license. The Tribunal noted that this case rested on factual matters. The Tribunal visited the proposed project site and found that both the site and buildings are suitable for the project, as there is adequate distance between the project and a neighbouring house. In addition, the site is well-fenced and the two buildings on the site are spacious and well-aerated. Finally, appellant promises to maintain the project, as well as to abide by the conditions imposed by the Ministry of Health.

The Tribunal ordered that an EIA license be granted to appellant on the condition that the two buildings at the poultry project be made flyproof, that litter is 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 for compliance with conditions set forth in an EIA license, but it is the Ministry of Environment & Quality of Life's EIA Committee which makes the decision about whether or not to grant an EIA license.

MOVEMENT SOCIAL DE PETIT CAMP/VALENTINA v. MINISTRY OF THE ENVIRONMENT AND QUALITY OF LIFE

MAURITIUS ENVIRONMENT APPEAL TRIBUNAL (CAUSE NO. 2/94) D. BEESOONDOYAL (CHAIRPERSON), ALLY DOSSA, AND KRISHNA NIRSIMLOO

Introduction

Movement Social de Petit Camp (appellant) appeals against the decision of the Minister of Environment and Quality of Life granting an EIA license to Maurilait Production Limitee (M.P. Ltee) to operate a factory at the DBM Industrial Estate at Valentina. Appellant argues that the this factory will cause numerous environmental problems, including dust, ash, smoke emissions, water pollution, and noise pollution.

Legislative Framework

Environmental Impact Assessment Act.

Held

The decision of the Minister of Environment and Quality of Life granting the EIA license was affirmed. The Minister did not act in an unreasonable manner in granting this EIA license.

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 and Quality 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 license, for example those relating to coal 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 license if M.P. Ltee met the EIA licence's conditions, and that M.P. Ltee had abided by these conditions most of the time.

PART D

KENYA

ABDIKADIR SHEIKH HASSAN and others v. KENYA WILDLIFE SERVICE

CIVIL CASE NO. 2059 OF 1996
IN THE HIGH COURT OF KENYA AT NAIROBI
G. P. MBITO, J.

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 which include the fauna and flora, unless this has been 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.

PART E

UNITED STATES

SIERRA CLUB ET. AL v. COLEMAN AND TIEMANN

14 ILM p.1425 (1975) & 15 ILM p.1417 (1976)
UNITED STATES : DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
BRYANT, J.

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 Columbia. 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 issuance 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 (FEIS), 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 FEIS is defective in certain critical areas, the preliminary injunction was extended.

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

The Legislative 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 *"There is no question but that the environmental effects of a major highway construction is within the expertise of EPA, 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, and 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, is a

defect, which is 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 " is devoted to an analysis of why the proposed shorter route, the Atrato route is preferable to the longer route, the Choco route, from an engineering and cost perspective. A discussion of the relative environmental impact of other land routes, such as the Choco route is indispensable, though the latter route might cost more or be less feasible from an engineering perspective. This will also enable a complete analysis of the impact of the proposed highway on the lives of the Choco and Cuna Indians, whose "cultural extinction" has been predicted in a superficial manner.

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 have 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 assessment of the defendants', as contained in the FEIAS, 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 Atomic Energy Commission 146 U. S. App. D. C. 33 at 39, 449 f. 2d 1109, 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. Atomic 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 510 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)

SIERRA CLUB v. MORTON

SUPREME COURT OF THE UNITED STATES, 405 U.S. 727, 92 S.CT. 1361 (1972) P. STEWART, J.

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 to which this area would be put. They sued as a "membership corporation" claiming they had a special interest in the maintenance and conservation of the area. The Sierra Club 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.

Legislative 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 member 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 for standing.

Cases Cited

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

CALVERT CLIFFS' COORDINATING COMMITTEE v. ATOMIC ENERGY COMMISSION

UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA 449 F.2D 1109 (1971) J. SKELLY WRIGHT, CIRCUIT JUDGE

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 101 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.

Legislative Framework

National Environmental Policy Act 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. Unlike the requirement for agencies to "use all practicable means consistent with other essential considerations" set forth for substantive duties under Section 101, and which 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, 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 (1st. Cir.), cert. denied, 395 U.S. 962, 89 S.Ct. 2100 (1969)

Zabel v. Tabb 430 F.2d 199 (5th Cir. 1970)

SECTION V

INTERNATIONAL

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 fact 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).

LEGALITY OF THE USE BY A STATE OF NUCLEAR WEAPONS IN ARMED CONFLICT: REQUEST FOR ADVISORY OPINION BY THE WORLD HEALTH ORGANISATION

INTERNATIONAL COURT OF JUSTICE
8 JULY 1996

Introduction

The Director General of the World Health Organisation, by a letter dated 27 Aug. 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, in to relationship with various autonomous and complementary organisations, invested with sectorial powers. The Court therefore concluded that the responsibilities of the WHO are necessarily restricted to the sphere of public "health" and can not 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.

REQUEST FOR AN EXAMINATION OF THE SITUATION IN ACCORDANCE WITH PARAGRAPH 63 OF INTERNATIONAL COURT JUDGEMENT OF 20 DECEMBER 1974 IN NUCLEAR TESTS CASES NEW ZEALAND v. FRANCE

INTERNATIONAL COURT OF JUSTICE SEPTEMBER 22, 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 judgement 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 judgement 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 judgement, and if those circumstances did not arise, that special procedure was not available. In deciding whether the basis of the 1974 judgement has been affected by the facts referred to by New Zealand, the Court held it is limited to an analysis of the 1974 judgement, and cannot now consider the question of broader objectives which New Zealand might have had in filing its application in 1973. The 1974 judgement 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
INTERNATIONAL COURT OF JUSTICE

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 judgement 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.

UNITED KINGDOM v. ICELAND

INTERNATIONAL COURT OF JUSTICE, 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.

Legislative 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 17 August 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

THE CORFU CHANNEL CASE (MERITS)

INTERNATIONAL COURT OF JUSTICE, 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.

Legislative 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. 1949,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 idemnity 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 idemnity for such damage should be fixed in such a manner as the Governments should agree upon.

INTERNATIONAL COURT OF JUSTICE

1997 General List No. 92
25 September, 1997

CASE CONCERNING THE GABČÍKOVO-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 Gabčikovo-Nagymaros Barrage System signed in Budapest on 16 September 1977 concerning the construction and operation of the Gabčíkovo-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 Gabčíkovo 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. By fourteen votes to one, that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčikovo Project for which the Treaty of 16 September 1977 and related instruments attributed responsibility to it;

B. By nine votes to six, that Czechoslovakia was entitled to proceed, in November 1991, to the "provisional solution" as described in the terms of the Special Agreement;

C. By ten votes to five, that Czechoslovakia was not entitled to put into operation, from October 1992, this "provisional solution";

D. By eleven votes to four, 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;

E. By thirteen votes to two, 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.

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, 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.

(The Separate Opinion of Vice-President Weeramantry is reproduced in full.)

SEPARATE OPINION OF VICE-PRESIDENT WEERAMANTRY

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 Gabčíkovo 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 generally.

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 accept this."[1]

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

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[1] See HR, paras. 1.45 and 1.47.

[2] SCM, para. 9.53. See also paras. 9.54-9.59.

[3] HR, para. 1.45.

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 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 fulfilled.

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[4] 146 votes in favour, with one vote against.

[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 Kéba 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 développement comme un droit de l'homme", *5 Revue des Droits de l'homme* (1972), p. 503.)

"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

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

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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".

[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.

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

[7] *See Sustainable Development in International Law*, Winfried Lang (ed.), 1995, p. 143.

(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 Declaration[8] provided a setting for the development of the concept of 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 sensitized 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

[8] For example, Principles 2, 3, 4, 5, 8, 9, 12, 13, and 14.

[9] These principles are thought to be based to a large extent on the Founex Report - *see Sustainable Development and International Law*, Winfried Lang (ed.), *supra*, p. 144.

[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.

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 recognition of the concept. The Bergen ECE Ministerial Declaration on

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9(1); 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").

[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 Development, 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 1 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 "sustainable 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. II, 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 Eastern Europe, that remedial measures must be taken "to ensure that their future economic development is sustainable" (ibid.). It also expressly recited that: "As 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 action" (ibid., Conclusions of the Presidency, Point 1.36, pp. 17-18).

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.

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[18] *Basic Documents of International Environmental Law*, Harald Hohmann (ed.), Vol. 1, 1992, p. 558.

[19] *Ibid.*, p. 598.

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 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].

(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*

[20] J. Brierly, *The Law of Nations*, 6th ed., 1963, p. 61; emphasis supplied.

[21] See, further, L. Krämer, *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.

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 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

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[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."

[23] Sir Robert Y. Jennings, "Universal International Law in a Multicultural World", in *International Law and The Grotian Heritage: A Commemorative Colloquium 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.

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.

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 -

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[24] "International Lawyers and the Progressive Development of International Law", *Theory of International Law at the Threshold of the 21st Century*, Jerzy Makarczyk (ed.), 1996, p. 423.

[25] Jennings, "Universal International 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.

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 protection 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 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, game 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

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[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, James 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 of the 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.

[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 contemporaneously and over the centuries. See note 41 below.

[29] Arnold J. Toynbee, *A Study of History*, Somervell's Abridgment, 1960, Vol. 1, p. 257.

[30] *Ibid., p.* 81, citing John Still, *The Jungle Tide.*

[31] Several of these are still in use, e.g., the *Tissawewa* (3rd C, B.C.); the *Nuwarawewa* (3rd C, B.C.); the *Minneriya* Tank (275 A.D.); the *Kalawewa* (5th C, A.D.); and the *Parakrama Samudra* (Sea of Parakraina, 1 Ith C, A.D.).

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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[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 Technology,* 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 Environmental Effects of Large Dams,* 1985, pp. 291-304.

[34] For these details, see Goldsmith and Hildyard, *ibid.,* pp. 291 and 296. The same authors observe:

"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 James Emerson Tennent, the nineteenth century historian, marvelled in particular at the numerous channels that were dug underneath 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'."

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

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[35] Toynbee, *supra*, p. 81. Andrew Carnegie, the donor of the Peace Palace, the seat of this Court, has described this ancient work of development in the following terms: "The position 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 still 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 thought to have been constructed in 504 B.C. (Sir James Emerson Tennent, *Ceylon*, 1859, Vol. 1, p. 367). A few examples, straddling 15 centuries, were:

- *the Vavunik-kulam* (3rd C, B.C.) (1,975 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, pp. 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* (5th 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;

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].

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

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- 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) (1 Ith C, A.D.), embankment 9 miles long, up to 40 feet high, enclosing 6,000 acres of water area. (Brohier, *Ancient Irrigation Works in Ceylon*, 1934, p. 9.)

[37] On the irrigation systems, generally, see H. Parker, *Ancient Ceylon, supra;* R.L. Brohier, *Ancient Irrigation Works in Ceylon*, 1934; Edward Goldsmith and Nicholas Hildyard, *op. cit.*, pp. 291-304. Needham, describing the ancient canal system of China, observes that "it was comparable only with the irrigation contour canals of Ceylon, not with any work in Europe" *(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. I, 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 Parakrarna, referred to in note 36. All of this was conceived within the envirorunental philosophy of avoiding any wastage of natural 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,* Turnour's translation, Chap. xxxvii, p. 242. *The Mahavamsa* was the ancient historical 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 4th century, A.D., and incorporating earlier chronicles and oral traditions dating back a further eight centuries, this constitutes a continuous record for over 15 centuries - see *The Mahavamsa or The Great Chronicle 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:

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]."

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

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"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 comes 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.

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

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[45] See K. N. Jayatilleke, "The Principles of International Law in Buddhist Doctrine", 120 *Recueil des Cours (1967-1)*,p. 558.

[46] For this idea in the scriptures of Buddhism, see *Digha Nikaya*, III, 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.

sluice, for dealing with this environmental problem[48], by controlling the pressure and the quantity of the outflow of 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:

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[48] H. Parker, *Ancient 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 of the valve-pit more than 2,100 years ago."

[49] H. Parker, *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 intake-towers or valve towers *(Bisokotuwa)* which were fitted in the reservoirs perhaps from the 2nd 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." (Joseph Needham, *Science and Civilization in China, op. cit.*, Vol. 4, p. 372.)

[50] K.M. de Silva, *A History of Sri Lanka,* 1981, p. 30.

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 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

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[51] Arthur C. Clarke, "Sri Lanka's Wildlife Heritage", *National Geographic* 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.)

[53] J. Brierly, *The Law of Nations, supra,* 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 James Emerson Tennent, *op. cit.*, Vol. I, p. 468);

> "The stupendous ruins of their reservoirs are the proudest monuments which remain of the former greatness of their country ... Excepting the exaggerated

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

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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.* I.)

[55] Goldsmith and Hildyard, *op. cil.*, pp. 282-291.
[56] *Ibid.*, pp. 284-285.

not allowed to pass through the plots in the rainy season. There was thus no over-irrigation, salinity was reduced, and water-borne 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

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[57] *Ibid.*, p. 284.

[58] Sir Charles Dundas, *Kilimanjaro and Its Peoples*, 1924, p. 262.

[59] Goldsmith and Hildyard, *op. cit.*, p. 289.

[60] See further Fidelio T. Masao, "The Irrigation System in Uchagga: An Ethno-Historical Approach", *Tanzania Notes and Records*, No. 75, 1974.

[61] *Qanats* comprise a series of vertical shafts 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.

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.

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

[64] Goldsmith and Hildyard, *supra*, p.308.

[65] *Op. cit.*, Vol. 4, p. 288.

[66] *Ibid.*, p.295.

[67] Needham, *Science and Civilization in China*, Vol. 2, *History of Scientific Thought*, 1969, p.69.

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.

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

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[68] Jorge, E. Hardoy, *Pre-Columbian Cities*, 1973, p.415.

[69] John 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 *Irrigation Civilization: A Comparative Study*, Julian H. Steward (ed.), 1955.

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 land 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

[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 J Int'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 environment, the Aboriginal people were not without their own development projects.

reflecting the ancient wisdom of the human family which the legal systems of the time and the tribe absorbed, reflected and turned into principles whose legal validity cannot be denied. 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 European culture, until the industrial revolution pushed these concerns into the background. Wordsworth 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

> "There were remarkable Aboriginal water control schemes at Lake Condah, Toolondo and Mount William in southwestern Victoria. These were major engineering feats, each involving several kilometres of stone channels connecting swamp and watercourses.
>
> At Lake Condah, thousands of years before Leonardo da Vinci studied the hydrology of the northern Italian lakes, the original inhabitants 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 Australian Perspective,* 1995, p. 35.)

[73] Nagendra Singh, *Human Rights and the 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 century's outstanding philosophers of science has observed:

> "The whole atmosphere of every art exhibited 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.)

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 inasmuch 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.

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

[75] See the Georgics, Book 11, 1. 36 ff.; 1. 458 ff. Also Encyclopaedia Britannica, 1992, Vol. 29, pp. 499-500. 16Goldsmith and Hildyard, op. cit., p. 316.
[76] Goldsmith and Hildyard, *op. Cit.,* p.316.

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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[77] Ibid.

[78] See, for example, 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 Process: A 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

[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.

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].

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

[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 Draft 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 (III UNRIIA (1941), p. 1907).

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 régime 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 régime. Indeed, the 1977 Treaty, with its contemplated régime of joint operation and joint supervision, had itself a built-in régime 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.

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[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.

(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.

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.

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[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 21.

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 environmentally 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 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

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[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 21st Century, supra,* p. 173.

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].

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[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 (United 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 Jamahiriya/Chad), I.C.J Reports 1994*, pp. 77-83.

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 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 1 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 them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural 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

[93] See, for example, Peter Brett, "Implications of Science for the Law", 18 McGill 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.

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.

APPENDIX

APPENDIX
PART A

ENVIRONMENT RELATED EXTRACTS FROM THE CONSTITUTIONS OF SOUTH ASIAN COUNTRIES (Referred to in the Cases)

BANGLADESH

Constitution of the People's Republic of Bangladesh as amended through 1986

Part II, Art. 23
The state shall adopt measures to conserve the cultural traditions and heritage of the people and so foster and improve the national language, literature and the arts that all sections of the people are afforded and the opportunity to contribute towards and to participate in the enrichment of the national culture.

Part II, Art. 24
The state shall adopt measures for the protection against disfigurement, damage or removal of all monuments, objects or places of special artistic or historic importance or interest.

Part III, Art. 31
To enjoy the protection of law, and to be treated in accordance with the law, and only in accordance with the law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with the law.

Part III, Art. 32
No person shall be deprived of life or personal liberty save in accordance with the law.

Part VI Art. 102
102. (l) The High Court Division, on application of any person aggrieved, may give directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.
(2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law—
(a) on the application of any person aggrieved, make an order

(i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or

(ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority, and is of no legal effect: or

(b) on the application of any person, make an order—

(i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office.

(3) Notwithstanding anything contained in the foregoing clauses the High Court Division shall have no power under this article to pass any order in relation to any law to which article 47 applies.

(4) Where on an application made under clause (1) or sub-clause (a) of clause (2), an interim order is prayed for and such interim order is likely to have the effect of—

(a) prejudicing or interfering with any measure designed to implement any socialist programme, or any development work; or

(b) being otherwise harmful to the public interest, the High Court Division shall not make an interim order unless the Attorney-General has been given reasonable notice of the application and he (or an advocate authorized by him in that behalf) has been given an opportunity of being heard, and the High Court Division is satisfied that the interim order would not have the effect referred to in sub-clause (a) or sub-clause (b).

(5) In this article, unless the context otherwise requires, "person" includes a statutory public authority and any court or tribunal, other than a court or tribunal established under a law relating to the defense services of Bangladesh or a tribunal to which article 117 applies.

INDIA

Constitution (52nd Amend.) Act, 1985

Article 19 Protection of certain rights regarding freedom of speech, etc.
(1) All citizens shall have the right -
(a) to freedom of speech and expression;

Article 21 Protection of life and personal liberty
No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 32 Remedies for enforcement of rights conferred by this Part
(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Article 47 Duty of the State to raise the level of nutrition and the standard of living and to improve public health
The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and of drugs which are injurious to health.

Article 48A Protection and improvement of environment and safeguarding of forests and wild life
The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

Article 51A Fundamental duties
It shall be the duty of every citizen of India -
(a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;
(c) to uphold and protect the sovereignty, unity and integrity of India;

(d) to defend the country and render national service when called upon to do so;
(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
(f) to value and preserve the rich heritage of our composite culture;
(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
(i) to safeguard public property and to abjure violence;
(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

Article 137 Review of judgements or orders by the Supreme Court
Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

Article 142 Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.
(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.
(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

Article 226 Power of High Courts to issue certain writs
(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.
(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power,

notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.
(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without - (a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.
(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

NEPAL

Constitution of Nepal as amended through 1980

Part IV, Art. 19(3)
The social objective of the Panchayat System shall be to establish a harmonious social life, based upon morality, by eliminating the obstacles that may arise in the process of mobilising the general public for setting up of a society as envisaged by clause (1) and to maintain national unity with due regards to the existing mutual harmonious tolerance upon the cultural and traditional values of Nepal adhered to by the Nepalese citizen from time immemorial as the prosperity and glory of Nepal as well as their national character.

PAKISTAN

Constitution of the Islamic Republic of Pakistan,

Part II, Art. 9
No person shall be deprived of life or liberty save in accordance with law.

Part II, Art. 14
(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.

Part VII, Art. 184
(1) The Supreme Court shall, to the exclusion of every other court, have original jurisdiction in any dispute between any two or more Governments.

> Explanation.-In this clause, "Governments" means the Federal Government and the Provincial Governments.

(2) In the exercise of the jurisdiction conferred on it by clause (1), the Supreme Court shall pronounce declaratory judgments only.

(3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article.

SRI LANKA

Constitution of the Democratic Socialist Republic of Sri Lanka, as amended through 1984.

Ch. VI, Art. 27
The state shall protect, preserve and improve the environment for the benefit of the community.

Ch. VI, Art. 28
The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka-

> ...
> (d) to preserve and protect public property and to combat misuse and waste of public property;
> ...
> (f) to protect nature and conserve its riches.

Ch. VI, Art. 29

The provisions of this Chapter do not confer or impose legal rights or obligations and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal.

APPENDIX
PART B

ENVIRONMENT RELATED EXTRACTS FROM THE CONSTITUTIONS OF OTHER ASIAN COUNTRIES

CHINA

People's Republic of China, Constitution of September 6, 1982

Chapter I, Art. 9
Mineral resources, waters, forests, mountains, grassland, unreclaimed land, beaches and other natural resources are owned by the state, that is, by the whole people, with the exception of the forests, mountains, grasslands, unreclaimed land and beaches that are owned by collectives in accordance with the law.

The state ensures the rational use of natural resources and protects rare animals and plants. The appropriation or damage of natural resources by any organization or individual by whatever means is prohibited.

Article 10
Land in the cities is owned by the state. . . . .All organizations and individuals who use land must make rational use of the land.

Article 12
Socialist public property is sacred and inviolable. The state protects socialist public property. Appropriation or damage of state or collective property by any organization or individual by whatever means is prohibit.

Article 26
The state protects and improves the living environment and the ecological environment and prevents and remedies pollution and other public hazards. The state organizes and encourages afforestation and the protection of forests.

CAMBODIA

Constitution of the Kingdom of Cambodia, 1993

Chapter III

Article 32
Every Khmer citizen shall have the right to life, personal freedom and security.
. . . .

Article 39
Khmer citizens shall have the right to denounce, make complaints or file claims against any breach of the law by State and social organs or by members of such organs committed during the course of their duties. The settlement of complaints and claims shall reside under the competence of the courts.

Article 40
Citizens' freedom . . . . The rights to privacy of residence . . . . shall be guaranteed.

Chapter IV

Article 54
The manufacturing, use, storage of nuclear, chemical or biological weapons shall be absolutely prohibited.

Chapter V

Article 58
State property notably comprises land, mineral resources, mountains, sea, underwater, continental shelf , coastline, airspace, islands, rivers, canals, streams, lakes, forests, natural resources, economic and cultural centers, bases for national defense and other facilities determined as State property.

The control, use and management of State properties shall be determined by law.

Article 59
The State shall protect the environment and balance of abundant natural resources and establish a precise plan of management of land, water, air, wind, geology, ecological system, mines, energy, petrol and gas, rocks and sand, gems, forests and forestrial products, wildlife, fish and aquatic resources.

Chapter IX

Article 109
The Judiciary power shall be an independent power. The Judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens. The Judiciary shall cover all lawsuits including administrative ones. The authority of the Judiciary shall be granted to the Supreme Court and to the lower courts of all sectors and levels.

Chapter X

Article 122
After a law is promulgated, the King, the Prime Minister, the President of the Assembly, 1/10 of the assembly members or the courts, may ask the Constitutional Council to examine the Constitutionality of that law.

Citizens shall have the right to appeal against the constitutionality of laws through their representatives or the President of the Assembly as stipulated in the above paragraph.

Chapter XII

Article 128
The National Congress shall enable the people to be directly informed on various matters of national interests and to raise issues and requests for the State authority to solve.

INDONESIA

Constitution of the Republic of Indonesia, 1945, abrogated 1949, reinstated July 5, 1959.

Chapter IV

Article 50
Protecting the environment in which the present generation lives and in which future generations will develop socially is considered a public responsibility in the Islamic Republic. Therefore, economic activities, and other activities which may pollute the environment or destroy it irrevocably, shall be forbidden.

LAO PDR

Constitution of the Lao People's Democratic Republic, August 15, 1991.

Chapter I

Article 6
The State protects the inviolable rights and democratic freedoms of the people. All state organizations and functionaries must inform the people of and educate them in the policies, regulations and laws, and together with the people, to implement them in order to guarantee the legitimate rights and interests of the people. All acts of bureaucratism and harassment that can be detrimental to the honour, body, lives, conscience and property of the people are prohibited.

Chapter II

Article 17
All organizations and citizens must protect the environment and natural resources: land, underground, forests, fauna, water sources and atmosphere.

Chapter III

Article 27
Lao citizens have freedom of movement and residence as prescribed by law.

Article 28
Lao citizens have the rights to lodge complaints and petitions and to propose ideas to relevant state organizations in connections with issues pertaining to the rights and interests of collectives or of their individuals.

Complaints, petitions and ideas of citizens must be considered for solutions as prescribed by law.

Article 31
Lao citizens have freedom of speech, press, assembly; of associations and of demonstrations, which are not contrary to the law.

MYANMAR (BURMA)

Constitution of the Socialist Republic of the Union of Burma, January 3, 1974.

Chapter X

Article 132 (1)
The People's Council at different levels are Local Organs of State power and they shall implement the following tasks within the framework of law: . . . .
(a) preservation, protection and development of natural environment;

PHILIPPINES

Constitution of the Republic of the Philippines, adopted October 15, 1986.

Article 2 DECLARATION OF PRINCIPLES AND STATE POLICIES

Section 5: The maintenance of peace and order, the protection of life, liberty, and property, and the promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy.

Section 16: The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

Article 3 BILL OF RIGHTS

Section 7: The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

Article 12 NATIONAL ECONOMY AND PATRIMONY

Section 2: All lands of the public domain, waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development and utilization of natural resources shall be under the full control and supervision of the State . . . ."

Section 3: Lands of the public domain are classified into agricultural, forest or timber, mineral lands, and national parks

. . . Taking into account the requirements of conservation, ecology, and development, and subject to the requirements of agrarian reform, the Congress shall determine, by law, the size of lands of the public domain which may be acquired, developed, held, or leased and the condition therefor.

Section 4: The Congress shall, as soon as possible, determine by law the specific limits of forest lands and national parks, marking clearly their boundaries on the ground. Thereafter, such forest lands and national parks shall be conserved and may not be increased nor diminished , except by law. . .

Section 5: The State, subject to the provisions of this Constitution and national development policies and programs shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.

Article 13: SOCIAL JUSTICE AND HUMAN RIGHTS

Section 4: The State shall, by law, undertaken an agrarian reform program. . . To this end, the State shall encourage and undertake the just distribution of all agricultural lands, subject to such priorities and reasonable retention limits as the Congress may prescribe, taking into account ecological, developmental, or equity consideration. . . .

Section 7: The States shall protect the rights of subsistence fishermen, especially of local communities, to the preferential use of the communal marine and fishing resources, both inland and offshore. . . .The State shall also protect, develop and conserve such resources. . .

THAILAND

Constitution of the Kingdom of Thailand, 1997

Article 56

Individuals are guaranteed the right to cooperate with state and local communities to conserve and benefit from natural resources and bio-diversities; and to protect, promote and maintain the quality of the environment so that the communities may continue to live in an environment which is not hazardous or threatening as provided by the law.

Any activity or project which can seriously affect the quality of the environment is prohibited unless an environmental study and evaluation is undertaken. The study must receive endorsement from independent agencies, which include representatives from environmental non-governmental organizations and university academics, as provided by the law.

Individuals are guaranteed the right to file lawsuits against government agencies, state enterprises, local administrative organizations and other organizations to require them to not violate the first and second paragraphs.

VIETNAM

Constitution of the Socialist Republic of Vietnam, 1992

Chapter II

Article 17

The lands, forests and mountains, rivers and lakes, water sources, underground natural resources, and other resources in the territorial seas, on the continental shelf, and in the air space; capital and assets that the state invests in the various enterprises and projects falling under different economic, cultural, social, scientific-technical, diplomatic, and national security and national defense programs and other property defined by law as belonging to the state are under the ownership of the entire people.

Article 18

All lands are put under unified state management according to plans and laws to ensure that they are utilized according to plans and laws to ensure that they are utilized according to set goals and bring about results.

The state allots land to the various organizations and individuals for use on a stabilized and long-term basis.

Organizations and individuals involved have the responsibility to protect, replenish, and exploit such land in a rational and economical fashion. They may transfer the right to the use of land allotted to them by the state as stipulated by law.

Article 29

State organs, units of the armed forces, economic and social bodies, and all individuals must abide by State regulations on the rational use of natural wealth and on environmental protection.

All acts to bring about exhaustion of natural wealth and to cause damage to the environment are strictly forbidden.

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