

**Compendium of Judicial Decisions  
on Matters Related to Environment**

**NATIONAL DECISIONS**

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# A I N T R O D U C T I O N

This publication has been developed in pursuance of the aims of Agenda 21, particularly chapter 8 which recognizes, among other things, the need to facilitate information exchange, including the dissemination of information on effective legal and regulatory instruments in the field of environment and development. This will encourage their wider use and adoption.

Consequently, the *Compendium of Judicial Decisions* was devised with two objectives. First, it aims to create awareness and enthusiasm among lawyers and non-lawyers alike on the current trends in the jurisprudence related to environmental matters. Second, it aims to provide resource materials for reflecting on specific pieces of court decisions from the point of view of courts of different perspectives, grounded as they are in the unique legal traditions and circumstances of different countries and jurisdictions.

The promotion of sustainable development through legal means at national and international levels has led to recognition of judicial efforts to develop and consolidate environmental law. The intervention of the judiciary is necessary to the development of environmental law, particularly in implementation and enforcement of laws and regulatory provisions dealing with environmental conservation and management. Thus an understanding of the development of jurisprudence as an element of the development of laws and regulations at national and international levels is essential for the long term harmonization, development and consolidation of environmental law, as well as its enforcement. Ultimately this should promote greater respect for the legal order concerning environmental management. Indeed, when all else fail, the victims of environmental torts turn to the judiciary for redress. But today's environmental problems are challenging to legislators and judges alike by their novelty, urgency, dispersed effect and technical characteristics.

Over the last two decades many countries have witnessed a dramatic increase in the volume of judicial decisions on environmental issues as a result of global and local awareness of the link between damage to human health and to the ecosystem and a whole range of human activities. In many countries the judiciary has responded to this trend by refashioning legal, sometimes age-old, tools to meet the demands of the times, with varying degrees of success or, indeed, consistency. But such practice is still firmly to take root in Africa where not much by way of judicial intervention has been in evidence.

The complexity of environmental laws and regulations makes it necessary for today's legal practitioners,

particularly from Africa, urgently to assimilate and understand the concepts and principles rising from the developing jurisprudence. This is because the rate of growth of the corpus of modern statute law in the environmental field is singularly rapid in Africa. In most countries awareness of the potential of judicial intervention in the environmental field has grown largely because citizens have instituted proceedings in courts. But in other countries the effectiveness of the judicial mechanisms is still weak because of lack of information and a dearth of human and material resources. This is compounded by weaknesses in the institutions in charge of environmental law enforcement.

Needless to say, inconsistent or incoherent enforcement of such laws inevitably will undermine the legal order in the environmental field. This necessitates exposure of law enforcement officers in general and the judiciary in particular to comparative jurisprudence as a basis for interpreting local issues. This *Compendium* is produced in the belief that the provision of information, such as is contained in the *Compendium* can contribute to the repertoire of knowledge which judicial officers and law enforcers can call on in their efforts to give meaning to the enforcement issues facing them. Thus, it is intended to be a resource for training and awareness creation, and a source of inspiration as enforcement officers grapple with day to day issues of environmental management.

Given the novelty of environmental law, the *Compendium* is a unique opportunity for practitioners, particularly those from Africa, where case law is still scarce, to raise their level of awareness and sensitivity to ecological concerns and to share their experiences on possible approaches to resolving environmental disputes.

The *Compendium* is divided into *National Decisions* and *International Decisions*, volumes I of which were published in December 1998. At the time it was anticipated that subsequent volumes would be published as availability of materials and resources permitted, and if the response to the publication of Volume I indicated that a demand existed. Subsequently, in 2001 Volume II of the *Compendium on National Decisions* was published. This publication constitutes Volume III of the *Compendium on National Decisions* for which sufficient material is available.

In this, as in previous Volumes, the introductory discussion on "Background to Environmental Litigation" is reproduced because it forms a useful substantive background to the texts which follow. The reason is that previous Volumes may not easily be available to the reader.

Consequently, it is desirable that, as far as is possible, each Volume should be a stand alone self-contained document.

As was done in previous Volumes this Volume too is divided into parts, reflecting emerging themes in environmental litigation. The themes provide only a loose grouping, and there are no strict dividing lines between them. Indeed, themes recur in various cases across the groupings. Finally, the cases in this Volume are drawn from both the common law jurisdiction as well as civil law jurisdictions. The decisions are of significance to lawyers from both jurisdictions even though the common law jurisdiction emphasizes the value of precedent while the civil law jurisdiction emphasizes the value of jurisprudence.

As is now established practice cases are drawn from a diverse range of countries and, where possible, are reproduced in the original language, in this case French, Spanish, Russian and Ukrainian. Translations from the original language are in all cases unofficial translations, and the texts are reproduced in the form in which they were received, with minimal editorial changes.

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# B A C K G R O U N D T O E N V I R O N M E N T A L L I T I G A T I O N

## 1. THE LEGAL BASIS OF CIVIL ACTION

Judicial intervention in environmental issues arises when persons resort to court action to seek redress for a grievance. Court action can be either civil action or criminal action. Civil action is resorted to typically by private parties while criminal action tends to be the preserve of public authorities. However, the boundaries are not at all seamless: there are many instances of public authorities bringing civil action, and of private individuals initiating criminal proceedings (i.e. private prosecutions). These tend, however, to be exceptional. Unlike the case with Volume I this Volume has also focused on criminal actions in addition to civil actions, especially on enforcement.

The traditional position has been that, whereas a public authority may take action explicitly to protect the environment, a private litigant can only take court action to seek redress for a private injury. Any environmentally protective effect resulting from the private action would be purely incidental. Where the private individual wishes to bring action to redress an injury to the public he has to seek the permission of the Attorney General to use his name in an action known as a “relator action.”

The traditional position found expression in the jurisprudence of the courts in common law and civil law jurisdictions alike. **Gouriet v Union of Post Office Workers** [1978] AC 435 is a leading English authority on the point. The House of Lords stated the position as follows:

... the jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement. To extend that jurisdiction to the grant of remedies for unlawful conduct which does not infringe any rights of the plaintiff in private law is to move out of the field of private law into that of public law with which analogies may be deceptive and where different principles apply. (p. 500).

A private individual could however bring action in his name on the basis of an interference with a public right in two situations: where the interference with the public right also interferes with some private right of the person concerned or where, in the absence of any interference with a private right, the person concerned has suffered damage peculiar to himself, which is additional to that suffered by the rest of the public.

The basis of a civil law claim is a “cause of action.” This arises when an injury is caused to a person or property. If the injury is caused by a public body in the context of the

exercise of public powers or the performance of a public duty the cause of action is in public law, whereas if it is caused by a private person the cause of action is in private law. The causes of action in public law are *ultra vires*, natural justice and error of law. The remedies for their redress are *certiorari*, prohibition, *mandamus*, and declaration. The causes of action in private law are trespass, nuisance, the rule in **Rylands v Fletcher** (the strict liability rule) and negligence. The remedies for their redress are an award of damages, injunction and a declaratory judgement.

A civil law action in public law is designed for challenging the legal validity of the decisions and actions of public bodies. This is the common law process of “judicial review.” It is now largely provided for by statute. Judicial review is not to be confused with action taken in private law to redress private wrongs, and one may not seek judicial review instead of taking action in private law simply because the defendant happens to be a public authority. The remedy is specifically designed for challenging the exercise of public power or the performance or failure to perform a public duty. Where the dispute with the public body does not relate to the exercise of public power (or the performance of a public duty), redress cannot be sought through a judicial review application; the public body must be sued through an action in private law, like any other wrongdoer.

### (a) Judicial Review

Judicial review is a remedy that may be used to:

- (i) quash a decision (*certiorari*)
- (ii) stop unlawful action (prohibition)
- (iii) require the performance of a public duty (*mandamus*)
- (iv) declare the legal position of the litigants (declaration)
- (v) give monetary compensation
- (vi) maintain the *status quo* (injunction).

Judicial review may be awarded where a public body has committed the following wrongful acts or omissions:

- (i) where it has acted beyond its legal powers (i.e. *ultra vires*); a decision or an act of a public body may be *ultra vires* for reasons such as the failure to take into account relevant matters or taking into account irrelevant matters.
- (ii) where it has acted contrary to the principles of natural justice, which require an absence of bias and a fair hearing in decision making.
- (iii) where it has acted in error of law.

Judicial review is a remedy under both statute and the common law, and has been adopted by all the common law jurisdictions.

### (b) Judicial review as a statutory remedy

Statutes typically provide that persons who are aggrieved with the decision of a public body may apply for a review to the courts. "Person aggrieved" was defined in a leading English authority **A.G (Gambia) v Njie** [1961] 2 All E.R. 540. Lord Denning said:

The words "person aggrieved" are of wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busybody who is interfering in things that do not concern him, but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.

### (c) Judicial review as a common law remedy

Quite apart from, and independently of, statutory provisions, judicial review is available as a common law remedy to which resort may always be had to challenge the decisions and actions of public bodies. In England, the Supreme Court Act 1981 and Order 53 of the Rules of the Supreme Court stipulate the procedure to be adopted in such cases. Similar procedures have been adopted by other common law jurisdictions.

Order 53 requires that the applicant seek leave of the court before filing the application. Leave is only granted if the court considers that the applicant has "sufficient interest" (or *locus standi*) in the matter in issue. Courts around the world have given varying interpretations to this concept, particularly in the context of environmental litigation. This has led to action in some countries, such as the Republic of South Africa, to introduce statutory provisions in the Constitution or elsewhere, widening the opportunities for access to the courts.

## 2. ACTION IN PRIVATE LAW

The private law causes of action are trespass, nuisance, the rule in **Rylands v Fletcher** (the strict liability rule) and negligence.

### (a) Trespass

Trespass arises where a person causes physical matter to come into contact with another's land. Trespass, therefore, protects an occupier's right to enjoy his or her land without unjustified interference. It is limited, however, to direct, rather than indirect, interferences.

### (b) Nuisance

There are two types of nuisance; public nuisance and private nuisance. Often the same act gives rise to both types of nuisance at the same time.

A public nuisance is an interference with the public's reasonable comfort and convenience. It is an interference with a public right and constitutes a common law criminal offence, quite apart from providing a cause of action in private law. In the English case of **Attorney General v P.Y. A. Quarries Ltd** [1957] 2 Q.B. 169 Lord Denning said of public nuisance:

It is a nuisance which is so widespread in its range and so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

A private nuisance is an interference with an occupier's use and enjoyment of his land. Not all interferences, however, amount to a nuisance. Nuisances are those interferences which are unreasonable, causing material and substantial injury to property or unreasonable discomfort to those living on the property. The liability of the defendant arises from using land in such a manner as to injure a neighbouring occupier. Thus nuisance imposes the duty of reasonable use on neighbouring occupiers of land. It is the cause of action most suited to resolving environmentally related disputes between neighbouring landowners.

The reasonableness, or unreasonableness, of the use giving rise to the complaint is determined on the basis of the locality in which the activity in issue is carried out. The English case of **Sturges v Bridgeman** (1879) 11 Ch.D. 852 is illustrative of this point. A confectioner had for more than twenty years used a pestle and a mortar in his back premises which abutted on the garden of a physician. The noise and vibration were not felt as a nuisance and were not complained of. But in 1973 the physician erected a consulting room at the end of his garden, and then the noise and vibration became a nuisance to him. His action for an injunction was granted, the court holding that "whether any-thing is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but by reference to its circumstances."

### (c) Strict Liability: the Rule in Rylands v Fletcher

This rule is based on the facts of the English case after which it is named. The defendant had constructed a reservoir to collect and hold water for his mill. Under his land were underground workings of an abandoned coal mine whose existence he was unaware of. After the



reservoir had been filled the water escaped down the underground workings through some old shafts, and flooded the plaintiff's colliery. The plaintiff filed suit and the court decided that:

the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of the escape.

The case was appealed to the English House of Lords which upheld the decision, one of the judges adding that the defendant was liable because he had been engaged in a "non-natural use of his land."

The rule makes an occupier strictly liable for the consequences of escapes from his land. However, this cause of action has not been relied a great deal partly because of difficulties in ascertaining the true meaning of "non-natural use." Some have argued that "non-natural use" refers to the conduct of ultra-hazardous activities on land, while others hold that it means no more than bringing on to land things "not naturally there."

#### (d) Negligence

Negligence arises from a failure to exercise the care demanded by the circumstances with the result that the plaintiff suffers an injury. In contrast to the three other causes of action, the basis for the action is not the occupation of property. A plaintiff needs to show that he is owed a "duty of care", and that the defendant has breached that duty of care, with consequent injury to the plaintiff.

The leading authority on negligence is the English case of **Donoghue v Stevenson** [1932] AC 562. Lord Atkinson said in that case that the duty of care is owed to "persons so closely and directly affected by the defendant's act that he ought reasonably to have them in contemplation as being so affected when directing his mind to the acts or omissions which are called into question." In other words, the duty of care is owed to those whom the defendant could *foresee* might suffer injury as a result of the defendant's act or omission.

### 3. THE REMEDIES

The three remedies in private law are damages, injunction, and declaratory judgement.

An award of *damages* is compensation given to a party who has suffered an injury. The sum awarded is based on the principle that the injured person should be placed in the position he or she would have been in if he had not been injured.

An *injunction* is an order from the court directing a party either to do or to refrain from doing something. It is granted

to stop a continuing or recurring injury, or in circumstances where damages would not be an adequate compensation. Typically, an injunction will not be granted unless the damage is serious. The Court will balance the inconvenience which declining to grant the injunction would cause the plaintiff against the inconvenience which granting it would cause the defendant.

A declaratory judgement is the court's declaration of the rights and duties of the parties before it. Its value lies in resolving a dispute by setting out clearly the legal position. Most litigants will act in accordance with the Court's declaration without the need for further orders. However, as the House of Lords in the English case of **Gouriet v Union of Post office Workers** "the jurisdiction of the Court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else." (p. 510)

### 4. THE PROTECTION OF THE RIPARIAN OWNER'S RIGHT TO WATER

There is one other entitlement under the common law which can form a basis of environmental litigation; the riparian owner's right to water.

Under the English common law a landowner is presumed to own everything on the land "up to the sky and down to the center of the earth". However, running water, air and light are considered to be "things the property of which belongs to no person but the use to all" [see **Liggins v Inge** (1831) 131 E.R. 263, 268]. Therefore, a landowner has no property in running water, air and light; all that his proprietorship entitles him to, as an incident of such proprietorship, is a "natural right" to use these elements.

Thus, a landowner whose land abuts running water, i.e. a *riparian* owner, has a natural right to water. The riparian owner is able to exercise, as of right, the right available to all members of the public to use running water since he has an access to the water which non-riparian owners do not have. The right of use is available equally to all riparian owners and therefore any one riparian owner must use it reasonably. No one riparian owner may use the water in such a way as to prejudice the right of other riparian owners [**Embrey v Owen** (1851) 155 E.R. 579]. Other riparian owners have a cause of action if there is unreasonable use by any one owner.

The scope of the riparian owner's rights extends to access, quantity and quality. Access enables the riparian owner to navigate, embark and disembark on his land. Quantity enables the riparian owner to abstract, divert, obstruct or impound the water to the extent of its natural quantity. He may use the water abstracted for ordinary (domestic) purposes such as drinking, cooking and washing, and for these purposes may abstract as much as he needs without restriction. Secondly, he may use it for "extraordinary"

purposes such as irrigation, but in this case must restrict the quantity he abstracts to that which does not prejudice the rights of other riparian owners. Thirdly, a riparian owner may attempt to abstract water for use outside of his land, but the common law disallows such “foreign” use of water. On quality the riparian owner is entitled to have the water in its natural state of purity.

If any of these rights are interfered with, the riparian owner has a cause of action. However, as the House of Lords held in the English case of **Cambridge Water Company v Eastern Counties Leather plc** ([1994] 1 All E.R. 910), the suit itself must be based on the traditional common law causes of action: trespass, nuisance, **Rylands v Fletcher** (strict liability) and negligence. It is the injury suffered which arises out of riparian ownership.

## 5. BACKGROUND TO CIVIL LAW SYSTEMS

Since it is the tradition of the *Compendium* to carry examples of judicial decisions from civil law jurisdictions, it is important to consider briefly the civil law system. On the whole this is typified by the French legal system, from which most French speaking African countries have derived their legal systems.

French judicial decisions can only afford analogies, not precedents, for courts which are so differently constituted as those in the English-speaking common law world. However, some of these analogies point to principles of general application, even though there are distinct differences as regards their form and style.

Among these differences are, first, that the word *jurisprudence* is not generally used in the civil law legal system in the same sense as in the common law system. In the former, it refers to something like the ‘*Case Law*’, the English term “*jurisprudence*” being equivalent to the French “*Théorie générale du droit*”.

The civil law system does not recognise the absolute authority of judicial precedents. It also attaches more weight to jurists writings than does the common law system. A key feature of the system is its grounding in a series of Codes and other statutes. Consequently, the fabric of the law is primarily statutory, the judiciary’s task being limited mainly to applying the provisions of the existing legal texts.

In principle, in the civil law system, even decisions of the superior courts are not recognised as automatically binding. However, for a long time now, the decisions of the Courts (or *la jurisprudence*) have been acknowledged as playing a major role in the development of the law in the civil law system and the creative function of the judiciary is now widely accepted. But, even then, though it is now generally accepted that decisions of the *Court de Cassation*, for example, are to all intents and purposes, regarded as authoritative for the future, the lower Courts still resist

innovations of the *Court de Cassation*. In this they are often encouraged by the writers of doctrine.

Another characteristic of the civil law system is that, although the decisions are reported in the Official Series on a scale probably comparable to that of common law jurisdictions, the legal judgements of the courts consist usually of a very short enunciations (embodied in a series of complex wordings (sentences), each prefaced by the words *considérant que* or *attendu que* (enumeration of facts and the reasons for the decision), without any citation or discussion of authorities.

### (a) An Example of a Civil Law Judicial System: The French Judicial System

In France, the judicial system and the various jurisdictional allocations are set out in the constitution and various basic statutes. Its structure is summarised briefly below.

(i) On the **general principles** that apply in the organisation of justice in France, the following stand out:

- The collegiality of jurisdiction (up to three judges can be found in one court);
- The fixity and permanence of jurisdictions;
- The professional status of judges (being a dominant feature);
- The total independence of judges (from the political influence, the influence of other judges as well as of the parties among others);
- The fact that justice is free of charge;
- Equality of access to justice and neutrality of the judges;
- The public nature of the administration of justice;
- The adversary nature of proceedings before the judge;
- The rule of a dual level of jurisdiction (trial and appellate levels);
- The responsibility of the State to ensure that justice is carried out swiftly and adequately.

(ii) **The institutions of justice**, commonly called “*jurisdictions*,” are:

- The *tribunaux* at a first degree (e.g. Tribunal de Grande Instance) and;
- The *Cours d’appel* (Appellate courts) at the second level.

There are several appellate courts of co-ordinate jurisdiction in France. However, some jurisdictions at a superior level are also called “tribunal” such as the “Tribunal des Conflits” and others are called “Conseils” such as the “Conseil d’Etat” or the “Haute Cour de Justice”. These terminologies have a bearing on the designation of judicial decisions. The decisions of tribunals are called “Judgements” while the decisions of the courts are called

“arret”(or order). When the decision has been issued by only one judge, they are called “Ordonnance” or, in some cases, “Decisions”.

Jurisdictions which have fewer cases to handle are said to be “Ordinary jurisdictions” and those whose work is voluminous and specialised are said to be the “juridictions spécialisées”.

As regards the powers of the appellate courts, though the French legal system considers an appeal as the continuation of the original suit, the powers, prestige and duties of the judges in courts of original jurisdiction and those of the ones in the appellate courts are different to a large extent. The appellate court has powers as regards the amendment and return of complaints and memorandum of appeal; the withdrawal of the suit where there is mistake, or where there is need for separation; trial of misjoined suits; and the like.

The **French judiciary system** consists typically of two categories of judicial orders:

- The *juridictions judiciaires*, which have jurisdiction on both criminal and civil matters and;
- The *juridictions administratives*, which are many and among which the most important is the *Conseil d’Etat*, (presided by the Prime Minister or his representative). These deal with administrative matters.

The *Conseil d’Etat* has got four specialised sections and has advisory administrative powers related to finance, interior affairs, public works and social affairs. It gives opinions on major administrative issues.

One other section of the *Conseil d’Etat* is judicial in nature. It is composed of one chairman, three (3) vice-chairmen and a number of counsellors, “*maître de requêtes*”, and “*auditeurs*”. The Chairman is the judge of single matters brought before that section.

Many subordinate courts act under the supervision of the *Conseil d’Etat* as they deal with various issues such as the national budget, the efficacy of the general administration of the State, public enterprises and so on.

Apart from the two categories set out above there are other specific types of jurisdictions which are totally different from the ones mentioned above. There is the so-called *Tribunal des conflits*, which in rank, is on top or above the two orders of jurisdictions. It deals with matters that involve the determination of competence amongst the two known orders of jurisdiction, particularly when a conflict of mandates arises. Its role is limited to determining the jurisdiction which is competent in the matter. There is also the *Conseil Constitutionnel* whose main role is to determine the ‘*constitutionality of laws*’. Its role has evolved into an indirectly political one as it deals with cases involving, for example, claims related to presidential or parliamentary elections.

In summary the civil order deals with matters related to civil liability proceedings, including criminal offences, while the administrative order deals with matters related to public authorities’ decisions affecting private persons. However, the boundary between the two orders of jurisdiction is not rigid.

One can also say that, in France, the courts have jurisdiction to try all suits of a civil nature except suits whose cognisance is expressly or impliedly barred by law.

As regards the nature or subject matter of the suits, certain courts in France are courts of special jurisdiction, inasmuch as some classes of cases involve disputes with which superior or specially experienced tribunals are particularly familiar, and which can more satisfactorily be disposed of by them, such as administrative decisions, revenue issues, and the like. Furthermore, cases of importance affecting considerable interests or involving questions of intricacy are left to be determined by the higher courts. Additionally, under the French Codes of Civil Procedure and Administrative Tribunals, it is provided that where the claim is in a particular field, that field is regarded as the subject-matter of the suit.

As regards the court in which such a suit should be brought, reference should be made to the administrative tribunals, particularly the “*Conseil d’Etat*” in the case of administrative jurisdictions. Under the French legal system, in matters relating to public matters, such as cases that involve public nuisances, suits may be may be instituted, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case. In principle, as in common law systems, a private individual cannot sue in respect of a public nuisance unless he shows that he has suffered special damage thereby.

Another relevant fact is that, under the French legal system, national courts are empowered to pass judgement against a non-resident foreigner, provided that the cause of action arose within the jurisdiction of the Court pronouncing the judgement.

The term *cause of action* as used here applies to torts as well as contracts. The meaning of the term *cause of action* has been the subject of considerable controversy. It has however been settled in the numerous decisions in which the question has been discussed extensively in the context of environmental litigation. It has been held that the term means either every material fact which needs to be proved by the plaintiff to entitle him to success, or everything which if not proved, would give the defendant an immediate right to judgement. The term is composed of many components, including the requirement that there must have been an infraction of the right claimed.

## (b) Jurisdiction in the French Civil Law System

As in any other legal system, the competence of a court in the French legal system means the “court’s jurisdiction.” Jurisdiction depends upon the nature or subject matter of a suit and upon its location, but often not on the pecuniary limits to the jurisdiction of the tribunal or court. While theories may differ as to the sources of judicial authority, environmental law suits now being litigated in many civil law countries, including France typically are initiated by environment protection organisations against Government agencies and local authorities’ decisions. The standing of these organisations rests basically upon their claim as being the appropriate representatives of the public interest. The liability of government bodies to be sued often depends on the existing legislation. However, whether a suit will lie at the instance of the Government depends on the existing substantive law.

As a commentator said, “*according to the exact conception of it given by the Roman lawyers, “Jurisdiction” consists in taking cognisance of a case involving the determination of some juror relation, in ascertaining the essential points of it, and in pronouncing upon them.*” The word *jurisdiction* is commonly used to mean jurisdiction in the ordinary sense described above, that is, a reference to local or pecuniary jurisdiction or to the Parties. It can also refer to the subject matter of a suit or the legal authority of a court to do certain things. All these possible meanings are provided in the French Code of Civil Procedure, the Code of Administrative Tribunals and the other Statutes that create the specialised jurisdictions and make the distinction between the two categories of legal settings (or orders): the civil order and the administrative order.

The existence of jurisdictions is primarily determined with reference to the law of the country. However, it is a general principle in civil law systems that whenever jurisdiction is given to a court by an enactment, and such jurisdiction is only given on certain specified terms contained in the enactment itself, these terms must be complied with in order to sustain the claim to jurisdiction. If they are not complied with the claim to jurisdiction cannot be sustained. This principle is emphasised in the French Code of Civil Procedure and Code of Administrative Tribunals. However, to found jurisdiction, there must, in the first place, be authority to pass judgement, that is, the authority to entertain judicial proceedings.

## (c) French Case Law and Environmental Liability

This part attempts to explain the framework within which, in France, those whose property or health is harmed by environmental hazards find compensation, and also to define some of the principal areas of practice and procedure that arise in bringing or defending environmental cases in France, and in civil law systems generally.

The principles relating to civil liability for environmental damage in France do not constitute a single body of law, even though the Code of Civil Procedure and the Code of Administrative Tribunals give an orientation as to the methodological aspects of litigation in general, which also concern environmental matters.

These principles constitute a patchwork of concepts related to rights and duties which have been developed by the Courts and Tribunals over many years in the general area of civil liability and compensation, and specifically, in the area of the tort of nuisance.

In France, it is not necessary for the claimant to show that ownership or occupation of land has been affected by a public nuisance, as public nuisance is a criminal offence as well as a civil tort. To be a public nuisance, the relevant activity and its effects do not have to be widespread.

Increasingly, it is no longer necessary that a class or group of citizens who come within the sphere or neighbourhood of the operation of the nuisance must be materially affected in terms of their reasonable comfort and convenience. The grounds for civil liability for environmental harm result either from a breach of statutory duty or are created by specific provisions in the domestic legislation such as those of the “*Code Rural*”.

The relevant “environmental torts” found in most civil law systems are negligence, nuisance and trespass. In these systems most aspects of the law on nuisance can be described as having been developed specifically to address the consequences of pollution or other effects on the environment of hazardous activities and substances. The types of nuisance are based on the fundamental duty that each person has not to conduct himself in a manner that unreasonably interferes with the use by others of their land and property or with the enjoyment of others’ public rights. In determining liability in nuisance, the judge is required to strike a balance between the interests of the claimant and those of the defendant, having regard to the level of interference that a neighbour can be expected to tolerate.

Liability for injury caused to another is generally based upon fault in French law, as provided in Article 1382 and 1384 of the Civil Code. Article 1384 provides that: “*A person is liable not only for the damage he causes by his own act, but for that caused by the acts of persons for whom he is responsible or by things that he has under his guard*”.

Article 1384 of the Civil Code is considered by the French courts to have established a presumption of fault which cannot be rebutted by claims that there was no fault, and it is in fact similar to the system of absolute or strict liability, in that the liability of the person who under his guard has the inanimate object causing the damage is presumed liable,

unless he can prove that the damage was the result of *Force Majeure*, or the act of the plaintiff himself, or a *cause étrangère* which was normally unforeseeable so that the damage was unavoidable and could not be imputed to him.

The presumption of fault, which is applied to the automobile accidents for example, has been justified by the French courts on the basis of the equitable considerations on account of the large number of accidents caused by motor vehicles and the impossibility in many cases of proving fault on the part of the driver.

The application of Article 1384 in the area of environmental risks and industrial accidents is appropriate. Further guidance as to applying such a principle of liability can be found in the following quotation from a case of an industrial accident. An author pointed out that:

“As machines took the place of man ... the number of accidents not only increased but, and this is more important, changed their character. Accidents came to have very often an obscure origin, an uncertain cause that made it hard to place responsibility ... The victim had to deal with powerful companies whose rules and obligations they did not know and with whom they engaged in such an unequal battle that they were defeated in advance. The defendants took refuge behind Article 1382 which, though it appears at first to give a basis for recovery in many cases, actually serves as a defence.”

Besides, the right of private individuals to bring civil claims in respect of public and private nuisances is to be distinguished from the power of local authorities such as the so called *prefet*, in respect of statutory nuisances as defined under the Law on the Classified Installations or under the Rural Code. These laws impose administrative duties and sanctions to the owners or operators of such establishments as part of the prevention and inspection policy and procedures.

The tort of negligence also has wide application to a range of public activities, particularly in the building industry and in the field of regulatory control or nature protection (eg the control of wild fires). The key elements here are:

- A- The existence of a situation in which the law requires a person to exercise care towards other person(s) who is or are the claimant(s),
- B- Breach by the defendant of the objective standard of care,
- C- Establishment of a link between the carelessness and the damage or injury which has resulted, and,
- D- The reasonable foreseeability of the carelessness giving rise to the damage or injury which it has caused.

The continuing analysis and reappraisal by the tribunals of the basic principles underlying these rights and obligations in the environmental risk field is exemplified in the more recent decisions of the “*Conseil d’Etat*”, the highest jurisdiction dealing with administrative matters in France.

However, the cases dealt with by the *Conseil d’Etat* give the impression that it is not at ease with environmental matters, particularly on issues that involve transboundary aspects. The consequence of its attitude is illustrated in the questions that arise from its Sentence of 18 April 1986 related to “**Société Les Mines de Potasse d’Alsace versus Province de la Hollande Septentrionale et autres**”. In that particular case there were no stipulations in international law as at 22 December 1980, which would have prevented the administrative authorities mentioned in the case, from issuing pollution licences. To understand this negation of any of the then existing international rules by the French jurisdiction, it is worth reading the conclusions arrived at by the *Commissaire du Gouvernement* (equiv. Attorney General), which are remarkable from the point of view of the reasoning, but contestable from the point of view of its substantial foundations.

Meanwhile, in addition to making awards for compensation in case of damage, in many cases, the civil law courts also grant injunctions ordering persons causing environmental harm to cease the activities, which are responsible for damage. Injunctions may also be granted to restrain activities, which threaten to do harm. Occasionally, such injunctions may be mandatory, i.e. requiring the person not only to stop the polluting activity complained of, but also take a positive remedial action, such as to make safe a source of that pollution or remove it.

The ability of private individuals, or groups, to enforce the provisions of environmental protection legislation provides a person aggrieved by a polluting activity with a legal means of bringing pressure to bear on the person responsible for that activity to abate it or to prevent its repetition. In France, as in other countries, the threat of environmental litigation for industrial concerns has increased greatly in recent times, as the conceptual foundation of the principles of *locus standi* are increasingly under test and scrutiny. This is a result not only of wider powers of the environmental agencies to impose remedial liability but of changes in public administration and legal procedures that have increased the will and capability of private individuals to bring civil action claims against polluters. The claims concerning nuisances and damage to health arising from pollution frequently involve many claimants.

As far as procedure is concerned, the institution of legal suits is made by the presentation of a plaint to the court, in

which a person sets forth his cause of action in writing. This can be in situations where either general legal principles are involved, - (principles of common application in almost all countries), or where those in which the French jurisprudence notions prevail.

The particular elements of the environment-related jurisprudence found in the French legal system simply constitute the context in which the policy issues such as combating water pollution, the management of classified establishments (or installations), protection of fauna, flora and the like, are resolved through the judicial system. However, the common characteristic of any legal system is that before any environmental resource that is declared public can be used, some kind of authorization from the government authority is necessary.

Lack of such an authorization, or shortcomings in the procedures for obtaining such an authorisation are considered as an offence. In that area, two kinds of permits

are usually issued: - a permit or licence, which is less permanent and easily revoked, and - a concession, which sets up reciprocal rights and obligations between the grantor and the grantee. This is the main feature of major French environmental legislation and other resource-control based legislation in most countries that are attempting to modernise their environmental legislation.

In the French legal system, provisions to afford better administrative control over the management of environmental resources are often introduced by statutes that give the courts enough power to define or determine the rights of users so long as they observe the existing legal provisions and the balance of the interests involved, particularly with the respect due to private property and public interest. The licencing or administrative authorizations and the inspection systems are adopted in order to subject most natural resources to administrative control.

# C T H E M A T I C O V E R V I E W O F J U D I C I A L D E C I S I O N S I N E N G L I S H

## (1) THE OVERVIEW

This volume features the following themes: forum for litigation; physical planning; use of police power in environmental management; pollution control; enforcement; the community ethic in environmental management; and animal protection. As pointed out already the attempt at categorization should not mislead the reader into taking the view that the cases reproduced illustrate only one theme in each case; on the contrary, the majority of the cases contain more than one issue. Therefore the categorization is based on that aspect of the case which provides the case's most unique contribution to the development of jurisprudence on environmental law.

## I FORUM AND JURISDICTION

The question of forum featured in Volume I. There it was stated that there are situations in which courts in more than one country may legitimately exercise jurisdiction over a legal dispute. This may be because the acts or omissions giving rise to the dispute occurred in more than one country or because the disputing parties have their domicile (country of residence) in different countries. This situation normally affects the operations of multinational corporations which operate in several countries through subsidiary companies.

The branch of law known as "conflict of laws" provides the rules for determining which country should exercise jurisdiction in such situations. The traditional rule is that jurisdiction ought to be exercised by the natural forum ("*forum conveniens*") of the dispute, unless there are exceptional circumstances justifying the exercise of jurisdiction by some other forum. The law considers the *forum conveniens* of a dispute to be the forum with the most real and substantial connection with the dispute. Connecting factors include (i) convenience, expense and availability of witnesses; (ii) the law governing the relevant transaction; (iii) the residence or business location of the parties.

In light of the weak institutional and legal arrangements for enforcing environmental law in poor countries the argument is increasingly made that it should be possible to take action against multinationals in their home countries. The cases below highlight instances of judicial determination of the question of jurisdiction in the context of environmental litigation.

1. *Recherches Internationales Quebec v Cambior Inc & Home Insurance & Golder Associates Ltd* (1998), Superior Court, (Canada)

2. *Lubbe v Cape plc*, 20 July, 2000 (UK)
3. *Felicia Adjui v The Attorney General*, Misc. 811/96 (Ghana)

*Recherches Internationales Quebec v Cambior Inc & Home Insurance & Golder Associates Ltd* was a class action brought in the Superior Court in Quebec Province, Canada. It arose out a spill into a watercourse of toxic effluent which occurred when the dam of an effluent treatment plant belonging to a gold mine ruptured. The goldmine was located in Guyana, Latin America. Its owner was Omai Gold Mines Ltd, a Guyanese corporation whose majority shareholder was Cambior Inc, a Quebec corporation. 23,000 victims of the spill filed suit in Quebec against Cambior Inc. To assist them an organization known as *Recherches Internationales Quebec (RIQ)* was formed.

Cambior contested the jurisdiction of the Court to try the issues which RIQ wished to raise in the class action. It argued that the courts in Guyana were the much more convenient forum to hear and decide the dispute. It argued that it had committed no fault which could give rise to an action by the victims against it and that, as majority shareholder, it is not responsible for any acts of negligence which Omai may have committed. It pointed out that it:

- (1) had no responsibility for the construction, maintenance, operation and management of the mine and its effluent treatment plant, nor did it make the principal decisions affecting the daily operations of the mine
- (2) despite the fact that the agreement between the joint venturers in the mining project gave Cambior extensive powers over the operation of the mine, in reality Omai quickly acquired the personnel, expertise and ability which allowed it over time to assume the duties which the mineral agreement assigned to Cambior
- (3) it was not a party to the contracts entered into with the Consultants and contractors for the design and construction of the mine; and
- (4) the senior officer of Omai in charge of all of its operations reports directly to Omai's President and Chairman of the Board.

In opposition, RIQ pointed out that Cambior financed the study which determined that the mining project would be economically feasible. The study also contained a basic design concept for the tailings pond which was later built in accordance either this concept. Further, the same individual was President and Chairman of the Board of both Cambior and Omai; he made all strategic decisions relating to Omai's operations.

The Court found that it had jurisdiction because Cambior had domicile in Quebec but concluded that it should decline to exercise jurisdiction in favour of the courts in Guyana since neither the victims nor the action had any real connection with Quebec. As it said: “[t]he mine is located in Guyana. That is where the spill occurred. That is where the victims reside. That is where they suffered damage. But that is not all. That law which will determine the rights and obligations of the victims and of Cambior is the law of Guyana. And the elements of proof upon which a court will base its judgment are located primarily in Guyana. This includes witnesses to the disaster and the losses which the victims suffered. It also includes the voluminous documentary evidence relevant to the spill and its consequences. These factors, taken as a whole, clearly point to Guyana, not Quebec, as the natural and appropriate forum where the case should be tried.”

The court rejected the argument that the victims would be denied justice should the court in Quebec decline to exercise jurisdiction. The court noted that whereas in Guyana the victims would lose the benefit of the class action vehicle available to them in Quebec, they still had available to them the procedure of a representative action which, though not providing the victims with the same procedural and evidentiary advantages as a class action, did permit them to sue Cambior collectively. Additionally, the court noted the victims could also proceed by way of individual actions, should they so choose. Finally, the court rejected the argument that the victims would not receive a fair hearing in Guyana on the basis that the administration of justice in Guyana was in such a state of disarray that it would constitute an injustice to the victims to have their case litigated in Guyana.

In coming to a decision the court took into account the following factors:

- (i) the residence of the parties and witnesses
- (ii) the location of the evidence
- (iii) the place where the fault occurred
- (iv) pending litigation, of which as many as 900 of the victims had already filed claims in Guyana against Omai one quarter of which had been settled.
- (v) the location of the defendant’s assets, and noted that Cambior had sufficient assets in both jurisdictions
- (vi) the law applicable to the litigation
- (vii) the advantages to the plaintiffs of suing in their chosen forum, and noted that although the class action procedure in Quebec was a distinct advantage, forum shopping was to be discouraged to avoid parties seeking out a jurisdiction simply to gain a juridical advantage when they have little or no connection with that jurisdiction; and
- (viii) the interest of justice, and held that RIQ has failed to bring forward any conclusive evidence to show that Guyana was an inadequate forum due to the many deficiencies which plague its system of justice.

The Court declared that the High Court in Guyana was in a better position that the decide the issues raised.

*Lubbe v Cape plc* also raised the issue of jurisdiction, in this case whether the proceedings should be tried in England or in South Africa.

The case involved over 3,000 plaintiffs each claiming damages against the Defendants for personal injuries (and in some cases death) allegedly suffered as the result of exposure to asbestos and its related products in South Africa. In some cases the exposure was said to have occurred in the course of the Plaintiffs employment; in others as a result of living in a contaminated area. The exposure was said to have taken place in different places in South Africa and over varying, but sometimes lengthy, periods of time, ending in 1979. One of the plaintiffs was a British citizen resident in England. All the others were South African citizens resident in South Africa. Most of the plaintiffs were black and of modest means.

The Defendant was a public limited company which was incorporated in England in 1893 principally to mine and process asbestos and sell asbestos related products. From shortly after 1893 until 1948 it operated a blue asbestos mine at Koegas and a mill at Prieska, both in the Northern Cape Province. In 1925 the defendant acquired shares in two companies, both incorporated in 1916, which operated a brown asbestos mine and a mill at Penge in Northern Transvaal. For practical purposes the head office of these companies was in Cape Town. In 1940 a factory was opened at Benoni, near Johannesburg to manufacture asbestos products. It was owned by a wholly owned subsidiary of the defendant.

In 1948 the corporate structure of the defendant was changed. The mine at Koegas and the mill at Prieska were transferred to a newly formed South African company, Cape Blue Mines (Pty) Ltd. The shares in Cape Blue Mines, Egnep and Amosa were transferred to a newly formed South African holding company, Cape Asbestos South Africa (Pty) Ltd (CASAP). The offices of all those companies were in Johannesburg. All the shares in CASAP were owned by the Defendant. In 1979 CASAP sold its shares in Cape Blue Mines, Egnep and Amosa to an unrelated third party buyer, which shortly thereafter sold them on. The Defendant continued to hold an interest in the South African companies which operated out of the factory at Benoni until 1989 (although the factory had been closed earlier) after which it had no presence anywhere in South Africa. When the proceedings begun it had no assets in South Africa.

Although originating in South Africa, the Defendant’s asbestos related business had not been confined to that country. From 1899 it operated a number of factories in England engaged in processing asbestos and manufacturing asbestos products. One such factory in Barking was run



by the Defendant from 1913 until 1962, and then by a wholly owned subsidiary until the factory was closed in 1968. Another subsidiary, incorporated in Italy, operated a factory in Turin which made asbestos products from 1911 until 1968.

Some of the claims made in the proceedings dated back to the times when the defendant itself was operating in Northern Cape Province. But the central thrust of the claims made by each of the Plaintiffs was not against the Defendant as the employer of that plaintiff or as the occupier of the factory where that Plaintiff worked, or as the immediate source of the contamination in the area where the Plaintiff lived. Rather the claim was made against the Defendant as a parent company which, knowing that exposure to asbestos was gravely injurious to health, failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group. It was alleged the Defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations with the result that the plaintiffs thereby suffered personal injury and loss.

The main issue raised by the plaintiffs claim was: "Whether parent company which is proved to exercise *de facto* control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of the factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company."

Following the commencement of action against it the Defendant applied to stay the proceedings on the ground of *forum non conveniens*.

The court stated that the issues in the present cases fell into two segments. The first segment concerned the responsibility of the defendant as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries. Resolution on this issue would be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken or not taken, whether the defendants owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence.

The second segment of the cases involved the personal injury issues relevant to each individual: diagnosis, prognosis, causation and special damage. Investigation of

these issues would necessarily involve the evidence and medical examination of each plaintiff and an inquiry into the conditions in which that plaintiff worked or lived and the period for which he did so.

The plaintiffs argued that these were proceedings which could not be effectively prosecuted without legal representation and adequate funding. Therefore to stay proceedings in England, where legal representation and adequate funding were available in favour of a South African forum where they were not would deny the plaintiffs any realistic prospect of pursuing their claims to trial.

The court held that both the legal and factual issues involved could only be done by, or under the supervision of, lawyers. The court held that, in the interest of justice, the matter should be tried in England. In the words of one of the judges: "I cannot conceive that the court would grant a stay in any case where adequate funding and legal representation of the plaintiff were judged to be necessary to the doing of justice and these were clearly shown to be unavailable in the foreign forum although shown to be available here."

*Felicia Adjui v The Attorney General* raised the issue of jurisdiction in the context, not of a multinational corporation, but of a multilateral inter-governmental institution.

The plaintiffs filed a suit claiming relief in respect to alleged nuisance committed in the construction of an open sewerage system at Tema, Ghana under funding granted to the Government of Ghana by the International Bank for Reconstruction and Development, (the World Bank). The World Bank sought an order that the court did not have jurisdiction over it on the basis that Ghana had an obligation to recognize the immunity of the Bank from suit unless waived. The Bank contended that its jurisdictional immunity applied in the instant case but the plaintiffs asserted that the wrong in question was one affecting private citizens and that to accede to the Bank's contention would have the effect of enabling persons in the position of the Bank to trample on rights of private persons and leave them without a remedy.

The court declined to exercise jurisdiction on the basis that to find the Bank subject to the court's jurisdiction would expose it to numerous actions arising only out of the fact that the Bank had made some aid available to a member state.

## II POLICE POWER AND COMPULSORY ACQUISITION IN ENVIRONMENTAL MANAGEMENT

In the absence of planning control a landowner may do as he pleases with his land, and is kept in check only by the prospect of complaints from neighbouring landowners. As long as neighbours do not complain, a landowner has no

obligations to protect the environment or to refrain from any damaging actions or omissions on his land.

Planning control limits the rights of a landowner over his land. The right of the state to control the uses to which a landowner may put his land is referred to as “police power.” The law of most jurisdictions recognizes the right of the state to protect the public’s interest through the exercise of police power. Such curtailment of a landowner’s rights may however amount to a confiscation of the rights.

The distinction between the legitimate exercise of the police power and the confiscation of the rights is a matter of degree of damage. In the valid exercise of police power reasonably restricting the use of property the damage suffered by the owner is incidental. However where the restriction is so great the landowner ought not to bear such a burden for the public good, the restriction has been held to be confiscatory (or in the US, a constructive taking) even though the actual use or the forbidden use has not been transferred to the government so as to amount to a confiscation in the traditional sense.

In the US where the jurisprudence on this issue has advanced furthest, the courts have held that whether a confiscation has occurred depends upon whether the restriction practically or substantially renders the land useless for all reasonable purposes. If the land can be put to some beneficial use the restriction will not be considered unreasonable. Further, if the damage is such as to be suffered by many similarly situated and is in the nature of a restriction on the use to which the land may be put and ought to be borne by the individual as a member of society for the good of the public safety, health or general welfare, it is a reasonable exercise of police power; but if the damage is so great to the individual that he ought not to bear it under contemporary standards, then courts are inclined to treat it as a taking of the property or an unreasonable exercise of the police power.

The state takes property “by eminent domain” (the theory that the state is the owner of last resort of all property) because the property is needed for a purpose that is useful to the public, and restricts use of property under the police power where such use is harmful to the public. From this results the difference between the power of eminent domain and police power. Where property is taken under the power of eminent domain the owner is entitled to compensation but if use of property is restricted in exercise of police power there is no right of compensation. Thus the necessity for monetary compensation for loss suffered to an owner through the exercise of police power arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm.

In the legitimate exercise of police power the State may impose a requirement for planning permission or other permit to be obtained by the landowner before exercising the right to develop the property. These requirements now

typically extend to the requirement for the conduct of an environmental impact assessment and to carry out mitigatory measures in line with the outcome of the environmental impact assessment. They also indicate that where there is scientific uncertainty it is the responsibility of the person proposing to change the environment to demonstrate that the changes proposed will not be adverse and in any case the precautionary principle shall be applied.

The cases that follow illustrate the use of police power for purposes of environmental protection including the requirement for planning permission and environmental impact assessment and the application of the precautionary principle to resolve an issue of scientific uncertainty.

1. *United States v Riverside Bayview Homes Inc* (United States of America)
2. *TranzRail Ltd v The Auckland Regional Council*, (New Zealand)
3. *Joint Stock Company “Okean” v Ministry of Environmental Protection and Nuclear Safety of Ukraine*, Case No 1/47 (1997), Ukraine
4. *Pollution Control Board v M.V. Nayudu*, 1999 S.O.L. Case No 53 (India)
5. *Namarda Bachao Andolan v Union of India and Others* (India)

In *United States v Riverside Bayview Homes Inc* the Clean Water Act prohibited any discharge of dredged or fill materials into navigable waters defined as “waters of the United States” unless authorized by a permit issued by the Army Corps of Engineers. Construing the Act to cover all “freshwater wetlands” that were adjacent to other covered waters, the Corps issued a regulation defining such wetlands as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and under normal circumstances do support a prevalence of vegetation typically adapted to life in saturated soil conditions.”

After the respondent begun placing fill material on its property near the shores the Corps filed a suit to stop it from filling its property without the Corps’ permission. The Court of Appeals took the view that the Corps authority must be narrowly construed to avoid a taking without just compensation. But the Supreme Court held that the land fell within the Corps jurisdiction.

The Court noted that governmental land use regulation may under extreme circumstances amount to a taking of the affected property, more so in situations where the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land. But the mere assertion of regulatory jurisdiction by a governmental body did not constitute a regulatory taking. A requirement that a person obtain a permit before engaging in a certain use of his property did not itself take the property. Indeed the permit system implied that the permission may be granted, leaving the landowner free to

use the property as desired. Moreover, even if the permit was denied there may be other viable uses available to the owner. Only when a permit was denied and the effect of the denial was to prevent “economically viable” use of the land in question could it be said that a taking had occurred. The court also held that equitable relief was not available to enjoin an alleged taking of private property for public use duly authorized by law when a suit for compensation could be brought subsequent to the taking.

*Auckland City Council and Tranz Rail Ltd v The Auckland Regional Council* raised the issue of compliance of a proposed development project with laid down development plans. It concerned appeals against decisions refusing consents in relation to a proposal for an underground transport and parking centre in central Auckland. The court held that the site was in an area where the natural character of the coastal environment had long since been compromised; and the diversion and taking of groundwater would not have an adverse effect on the environment on its own or cumulatively. The court held further that the activities in question were proposed to facilitate establishment of a transport and parking centre designated in the district plan and consistent with the Auckland Regional Land Transport Strategy. Therefore the proposed diversion and taking of groundwater was in accordance with the relevant planning instruments.

*Joint Stock Company “Okean” v Ministry of Environmental Protection and Nuclear Safety of Ukraine*, Case No 1/47 (1997) dealt with the process to be followed in granting permits.

In 1995 construction of a complex for loading fertilizers commenced without a positive finding by the State Environmental expert body. The construction was suspended by the Deputy Minister pending the making of positive findings of the state environmental expert body. On 15th December 1995 the State Department of the Ministry of Environmental Safety of Ukraine made negative finding concerning the project and returned the technical economic calculations for revision. On 27th December 1995 the Ministry of Environmental Safety decided to deal with the project directly and charged the Ukraine Scientific Centre of the Sea Ecology with the preparation of the draft conclusions.

On 6th May 1996 the state environmental expert body made findings on the materials and also indicated that the decision about the appropriateness of the practical realization of the TEC should be taken by the local government taking into account the interests of the city and its residents. The plaintiffs, who did not agree with the validity of this conclusion filed a complaint to the court.

The court held that the complaint was well founded. Article 10 of the Law of Ukraine on the Environmental Expertise obliged the applicants to announce through the mass media about the findings of the State environmental expert body

in the form of a special declaration before the findings. This requirement of the law was aimed at guaranteeing the main principles of the environmental findings, i.e. the principles of publicity, objectivity, complexity, variance, precaution and due account of the public opinion.

In this case the defendant did not comply with and did not take due account of this requirement of the law. In conclusions of the findings on April 18th 1996 the defendant itself considered as necessary the publication of the declaration on the environmental impact of the proposed activities in the local mass media. In spite of the fact that such declaration had not been published before the beginning of the consideration of the environmental findings and after the defendant’s decision about it in the conclusions of 18.4.96, the defendant made the positive conclusion of the State environmental expert findings on 6th May 1996. Such a declaration was published on 9th July 1996, two months after the conclusion of the findings.

Part 2 of Article 34 specified that the state environmental findings of those types of activities and objects which bore a high environmental risk shall be carried out only after the announcement of the declaration on the environmental impact of the proposed activities by the applicant through the mass media. In addition the law obliged the applicant to submit to the bodies responsible for the environmental expertise the set of documents with the grounds of the evaluation of the impact on the environment.

The Court held that those requirements were violated during the realization of the findings in question. The Court did not have evidence of the approval of the documentation by the State Supervisory Committee on the Occupational Safety which was necessary to determine whether the documentation met the requirements of the laws on occupational safety. The Court did not accept the defendant’s arguments that the fact that the Declaration had not been published before the conclusion of the findings did not impact on the conclusions and did not restrict public participation in the discussion concerning the construction of the terminal because there were a lot of publications in the mass media concerning the issue. The court held that the law did not provide for the possibility of substituting the special declaration by other publications in the mass media. The Court therefore declared the conclusions invalid, and required stoppage of the construction until the proper findings were made.

*In Pollution Control Board v Nayudu* the respondent company purchased 12 acres of land and applied for consent for the establishment of a chemicals industry. When its application was rejected it applied to the court. The court observed that the case involved adjudicating on the correctness of the technological and scientific opinions presented, a task which the court was not equipped to undertake. It therefore opted to refer the matters to a technical authority to give its opinion.

In another landmark Indian decision, *Namarda Bachao Andolan v Union of India* and Others, the question before the court was the petitioner's contention that the environmental clearance granted by the Government for the construction of the Namarda dam had been granted without proper study and understanding of the environmental impact of the project.

The court observed that the evidence disclosed that the Government had been deeply concerned about the environmental aspects of the project, and because there was a difference of opinion between the Ministries of Water Resources and the Environment and Forests the matter had been dealt with by the Prime Minister who gave environmental clearance on 13<sup>th</sup> April 1987.

At the time when the environmental clearance was granted by the Prime Minister whatever studies that were available were taken into consideration. Consequently, the court held that the contention that the environmental clearance was given without a proper application of mind was not justified. The court observed that there were different facets of the environment, and if, in respect to a few of them adequate data was not available it did not mean that the decision taken to grant environmental clearance was in any way vitiated. The court observed that the clearance required further studies to be undertaken, and this was being done. It held that since care for the environment was an on-going process the system in place would ensure that ameliorative steps were taken to counter the adverse effects, if any, on the environment with the construction of the dam.

A second issue for the court's consideration was the contention that the relief and rehabilitation measures for the displaced persons were inadequate. The petitioners contended that no proper surveys were carried out to determine the different categories of affected persons as the total number of affected persons had been shown as much lower and many had been denied the status of PAFs (project affected families).

The court held that the evidence showed that the number of PAFs had been identified after detailed study. The court observed further that the underlying principle in forming the rehabilitation and resettlement policy was not merely that of providing land for the PAFs but there was a conscious effort to improve the living conditions of the PAFs and bring them into the mainstream. A comparison of the living conditions of the PAFs in the submerging villages with the rehabilitation packages provided showed that the PAFs had gained substantially after their resettlement. Finally, the court observed that Grievance Redressal Authorities had been set up to deal with the grievances of the PAFs.

The court stated that in summary two conditions had to be kept in mind: (i) the completion of the project at the earliest and (ii) ensuring compliance with conditions on which clearance of the project was given including

completion of relief and rehabilitation work and taking of ameliorative and compensatory measures for environmental protection in compliance with the scheme framed by the Government. It ordered that the construction of the dam continue while implementing the necessary mitigatory measures.

### III ENFORCEMENT

"Enforcement" refers to the process of compelling compliance with legal requirements. When used in the context of judicial action it refers to the orders which the court may grant to bring about compliance with its decisions.

In respect to disputes between private parties the private law remedies available are damages (which is monetary compensation), injunction (which requires a party to do or refrain from doing something) and a declaration (which states the legal position). In respect to disputes with public bodies the public law remedies available are certiorari, (quashing the unlawful decision), prohibition (stopping an unlawful act), mandamus (requiring the performance of a public duty) or injunction (maintaining the status quo). In extreme cases the court may compel compliance with its order by way of committal to prison for contempt.

The cases that follow illustrate the use of the enforcement powers of the court to secure compliance with environmental requirements.

1. *Ramakrishnan v State of Kerala*, O.P NO 24166 of 1988 (India)
2. *Vellore Citizens Welfare Forum v Union of India*, PIL 981-97, India
3. *The Barbuda Council v Attorney General & Others*, No 456 of 88 Antigua & Barbuda

*Ramakrishnan v State of Kerala* was an original petition highlighting the dangers of passive smoking and seeking prayers to declare that smoking of tobacco in any form in public places was illegal, and also seeking an order commanding the State to take appropriate and immediate measures to prosecute and punish all persons guilty of smoking in public places, and to treat smoking in public places as a public nuisance as defined in the Indian Penal Code.

The court held that smoking in public places vitiated the atmosphere so as to make it noxious to the health of persons who happened to be there. Therefore it was an offence punishable under s. 278 of the Penal Code. The Court ordered that an order be promulgated prohibiting public smoking in public places and that appropriate action be taken to display "smoking prohibited" boards in respective places.

*Vellore Citizens Welfare Forum v Union of India* was a petition against pollution which was caused by discharge of untreated effluent by tanneries and other industries into

agricultural fields, road sides, water ways and open lands and into the River Palar which is the source of water supply to the residents of the area. There was evidence that the tanneries and other industries had been persuaded for ten years to control pollution generated by them but to no avail.

The court had also been monitoring the petition for 5 years. But despite the repeated extensions which had been granted to the industries by the Court during the five years and prior to that by the Board the tanneries had failed to control the pollution generating.

The Court ordered that the Central Government constitute an authority and confer on it all powers necessary to deal with the situation created by the tanneries and other polluting industries. The Authority would implement the precautionary principle and the polluter pays principle. It would identify the families who had suffered because of pollution and assess the compensation to be paid to them, and would also identify the payment to be made by the industries for reversing the damage to the ecology. The Court ordered that the money would be recovered from the polluters, if necessary, as arrears of land revenue. Additionally, the authority would direct the closure of the industry managed by a polluter who refused to pay the compensation awarded against him. Other orders included an order that each polluter pay a fine to be placed in an Environment Protection Fund and be utilized for compensation and environmental restoration. The court ordered the authorities and expert bodies to frame schemes for reversing the environmental damage caused by the pollution. The court required the Madras High Court to monitor the implementation of its orders through a special bench to be constituted called a Green Bench.

*The Barbuda Council v Attorney General & Others* illustrates the use of committal for contempt as an enforcement measure.

In this suit the Plaintiff filed a motion for committal of three persons to prison as follows:

- (1) Hilroy Humhreys, Minister of Agriculture, Fisheries, Lands and Housing for his contempt (i) in aiding and abetting the other defendants in mining and winning sand notwithstanding an order dated 30th September 1992 which restrained the defendants from winning or mining sand outside delimited areas (ii) authorizing the use of the third defendant's equipment for mining and winning sand (iii) selling the sand mined to the third defendant (iv) authorizing the third defendant to transport the sand, process it, load it on to vessels and ship it at the third defendant's expense;
- (2) Rueben Wolff Managing Director of Antigua Aggregates Ltd and General Manager of Sandco Ltd for abetting breach of injunction; and
- (3) Knackbill Nedd, director and shareholder of SANDCO Ltd for contempt in refusing to obey the

court order dated 30th September 1992 which restrained the defendants from winning or mining sand outside delimited areas.

The facts of the case were that following an interim injunction against SANDCO which prohibited it from mining sand in a designated area, the Minister for Agriculture sought Cabinet approval to enter into an arrangement with SANDCO involving the mining of sand. Cabinet considered the serious shortage of sand mining operations in Barbuda which had been seriously restricted as a result of an interim court injunction against SANDCO. Cabinet therefore authorized the Minister of Agriculture to mine until the final determination of the suit and to rent equipment from SANDCO in order to mine the sand, to sell and deliver the sand to SANDCO and also to authorize SANDCO to transport the sand to the processing area, to load it on vessels and ship it at SANDCO's expense.

As the court observed, under this arrangement the Ministry would mine the sand in the area in which the order prohibited the mining. The mined sand would then be sold on the spot to SANDCO who was forbidden by the order from mining. SANDCO would then take the sand and transport and process it and ship it. The Court held that this was an attempt to "get around the order of the Court and do the very thing which the court order forbade the defendant's not to do." The court held that the Minister for Agriculture who took the matter to Cabinet was prepared to defy the Court order to assist the third defendant in mining the sand.

The Court pointed out that there were three sanctions for contempt of court. A fine would not be adequate punishment in this case nor would sequestration of property. A custodial sentence would be the most appropriate. The Court therefore sentenced each of them to prison for one month.

#### **IV BURDEN OF PROOF**

Typically, the commission of a criminal offence requires two elements: a guilty act (*actus reus*) and a guilty mind (*mens rea*). In other words acts or omissions become criminal only when committed with a culpable intention. In a prosecution, both elements need to be proved if the offence is to be made out.

In the field of environmental management however, strict adherence to these requirements would emasculate all effort at enforcement since environmental offences, being typically offences of omission rather than commission, are rarely committed with intent. To put it simply, rarely does a person set out deliberately to pollute a river. Rather the pollution occurs because of a failure to take preventive measures and to put in place systems to ensure that no pollution occurs. Since pollution control systems cost money, time and effort to put in place and to maintain, the offence often arises because of the failure to take the

necessary preventive action due to reasons of cost, ignorance or other such like factors.

The aim of criminal sanctions in this field therefore is to ensure that action is taken to put in place preventive systems. Therefore legislation often provides that environmental offences are offences of *strict liability*, obviating the need to prove intent (or *mens rea*). This eases the burden of proof considerably and underscores the imperative to take preventive action.

The following cases illustrate the use of strict liability in environmental offences, making conviction more likely.

- 1 *Environment Agency v Empress Car Co. (Abertillery)*, 2 WLR (1998) UK
- 2 *Environment Agency v Brock plc*, (1998) *Envr. LR* (UK)

*Environment Agency v Empress Car Co. (Abertillery)* was a criminal prosecution arising out of a water pollution incident.

The appellant maintained a diesel tank in a yard which drained directly into a river. The tank was surrounded by a bund to contain spillage, but the appellant had overridden that protection by fixing an extension pipe to the outlet of the tank so as to connect it to a drum standing outside the bund. The outlet from the tank was governed by a tap which had no lock. On March 20th 1995 the tap was opened by an unknown person and its entire contents run into the drum, overflowed into the drum, overflowed into the yard and passed down the drain into the river. The appellant was charged with causing polluting matter to enter controlled waters contrary to section 85(1) of the Water Resources Act 1991 and was convicted.

The Appeal Court dismissed the appeal and held that on a prosecution for causing pollution under section 85(1) of the Water Resources Act it was necessary to identify what the defendant was alleged to have done to cause the pollution; that when the prosecution had identified some act done by the defendant the court had to decide whether it caused the pollution; that if a necessary additional condition of the actual escape was the act of a third party or a natural event the court should consider whether that act or event should be regarded as a matter of ordinary occurrence which would not negative the effect of the defendant's act, or something extraordinary leaving open a finding that the defendant did not cause the pollution; that the distinction between ordinary and extraordinary was one of fact and degree to which the court had to apply common sense of what occurred in the locality.

The court held that the liability imposed by the Act was strict; it did not require *mens rea* in the sense of intention or negligence. Strict liability was imposed in the interests of protecting controlled waters from pollution. Therefore the fact that the a deliberate act of a third party caused the

pollution did not in itself mean that the defendant's creation of a situation in which a third party could so act did not also cause the pollution for the purposes of section 85(1). The court stated that while liability under section 85(1) was strict and therefore included liability for certain deliberate acts of third parties and natural events, it was not an absolute liability in the sense that all that has to be shown was that polluting matter escaped from the defendant's land, irrespective of how this happened. It must still be possible to say that the defendant caused the pollution.

The court held that foreseeability was not relevant in deciding whether the defendant caused the pollution. However, the true distinction was between acts which, although not necessary foreseeable in the particular case are in the generality a normal and familiar fact of life, and acts or events which were abnormal and extraordinary. An act or event which was in general terms a normal fact of life may also have been foreseeable in the circumstances of the particular case, but foreseeability was not necessary for the purposes of liability. The distinction between ordinary and extraordinary was the only common sense criterion by which one could distinguish those acts which would negative causal connection from those which would not.

Similarly in *Environment Agency v Brock plc*, the Environment Agency appealed against the dismissal of a prosecution brought against Brock plc for polluting controlled waters contrary to the Water Resources Act 1991 in respect of an escape of tip leachate being pumped to a man-made ditch. The leakage occurred as a result of the bursting of a seal manufactured by a third party. The court held that the pumping of the leachate was a positive act without which the pollution would not have occurred and, while the bursting of the seal was unforeseeable, it was a normal fact of life rather than an extraordinary occurrence. Brock was therefore liable for the pollution, having done something to cause the leak, and there was no need to demonstrate knowledge or negligence on its part.

## V THE RIGHTS OF LOCAL COMMUNITIES TO UTILIZE LOCAL NATURAL RESOURCES

Increasingly, local communities assert a right to utilize and manage local natural resources. At times these claims result in litigation. Earlier Volumes reproduced some examples of such cases. This Volume also contains at least one further example, the Kenyan case of *Kemai v The Attorney General*.

This was a case in which a Kenyan community, the Ogiek community sought a declaration that their eviction from Tinet Forest by the Government contravened their rights not to be discriminated against. This was based on the claim that they have been living in Tinet Forest since time immemorial. The Plaintiffs said that the Tinet Forest, one of the country's gazetted forests, was their ancestral home from where they derived their livelihood, where they

gathered food and hunted and farmed. They argued that they would be landless if evicted from the forests. The applicants argued that they depended for their livelihood on this forest, being as they were food gatherers, hunters, peasant farmers, bee keepers and that their culture was associated with this forest where they had residential houses. They argued further that their culture was basically one concerned with the preservation of nature so as to sustain their livelihood, and that they themselves had been a source of preservation of the natural environment, they had never been a threat to the natural environment.

The respondents maintained, *inter alia*, that the applicants were not genuine members of the Ogiek community. They had entered the forest unlawfully and so were given notice to vacate.

The court held that the Ogiek had changed from the traditional forest dependent community to a modernized people no longer living a simple forest based lifestyle. For the applicants to say that they led a life which was environmentally conservative was to speak of a people of a by-gone era, and not of the present.

It was conceded that the applicants and their forefathers were repeatedly evicted from the area but they kept on returning. However, it was argued by the applicants that the repeated evictions and returns showed a continuing struggle and a resistance.

The court found that if the applicants were living in the forests they were doing so forcefully as part of their continuing struggle and resistance, and that they are not there after compliance with the requirements of the Forest Act as they had not sought a licence to be there. The applicants had argued that the Forest Act found them there in 1942 when it was enacted. They argued further that to evict them would be unconstitutional because (i) it would defeat a people's right to their indigenous home and deprive them of their right to livelihood and (ii) was discriminatory in so far as other ethnic groups who were not Ogiek were not being evicted from this place.

The applicants also tried to show that the Government had allowed them to remain in the area and given them allotment letters. The court however held that this showed that the applicants recognized the Government as the owner of the land in question and therefore they could not assert that the land was theirs from time immemorial. The court held that to say that to be evicted from the forest was to be deprived of a means of livelihood because there would be no place from which to collect honey or get wild game was to miss the point. One did not have to own a forest to hunt in it or to harvest honey from it. Those who wished to exploit the natural resources of the Tinet Forest did not have to reside in the forest. There was no reason why the Ogiek should be the only community to own and exploit at source the country's natural resources, a privilege not

enjoyed or extended to other Kenyans.

The court held that the Ogiek were not being deprived of a means of livelihood and right to life. Like very other Kenyan they were being told not to dwell on a means of livelihood preserved and protected for all others in the country. But they could, like other Kenyans, still eke out a livelihood out of the same forest area by observing permit and licensing laws like every one else does. The court dismissed the application.

## VI. THE PROTECTION OF ANIMALS

Ordinarily the protection of animals, particularly those in captivity, is conducted under laws dealing with cruelty to animals, and constitutes a specialized branch of wildlife legislation. Originally a rather arcane branch of the law, it has in recent years gained a higher profile as part of wider laws related to the conservation of biological diversity whose tenets require that biological diversity be conserved and protected both *ex situ* and *in situ*. Laws on the treatment of captive animals are an aspect of *in situ* protection of biological diversity.

The content of laws on animal protection relate to the prohibition against unjustified killing, minimum standards of treatment, the banning of the use of animals for certain sporting activities, and requirements relating to proper practices for putting down (killing) animals where this is necessary either because the animal present a danger to the public or because the animal is unwell.

The three cases that follow illustrate aspects of the law relating to protection of animals.

1. *Leonardia Safaris v Premier of Gauteng Province* (South Africa)
2. *Environmental Foundation Ltd v Ratnasiri Wickramanayake* (Sri Lanka)

In the case of *Leonardia Safaris*, the applicant, a professional hunter, wished to import rhino into the province and take it to a farm where he had a client who wished to shoot it. This applicant sought to compel the authorities to issue the relevant permits to enable this to be accomplished. In order to import the animal into the Province and then to shoot it two permits were required. The permit was not issued but the applicant alleged that authority had been given for the permit to be given at some time in the future and so the applicant argued that he had a "legitimate expectation" of being granted a permitted.

In 1998 the applicant was informed that a permit for the shooting of the animal had been refused. This led to this application. The court dismissed the application holding that a "legitimate expectation" did not amount to the acquisition of legal right which could be enforced in a court of law.

In *Environmental Foundation Ltd v Ratnasiri Wickramanayake* (Sri Lanka) the petitioner filed an application for a writ of *certiorari* to quash an order of the Director of the Department of Wildlife Conservation permitting the display of 30 species of animals at a private zoo which was open to the public on payment of an entrance fee. The relevant section of the law allowed authorization to keep animals in a zoo for the protection, preservation or propagation, or for scientific study or

investigation, or for the collection of specimens for a zoo, museum or similar institution of the fauna and flora of Sri Lanka. The petitioner submitted that only a national zoo, and not a private zoo, could be granted such authorization. Therefore the permit was illegal, null and void.

The court held however that it could not interfere with the Minister's legitimate exercise of his discretion and declined to grant the orders sought.



# **1. TEXTS**



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***Forum and Jurisdiction***

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**CANADA**

**PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL**

**NO: 500-06-000034-971**

**PRESIDING:**

**SUPERIOR COURT**

**(CLASS ACTION)**

**August 14 1998**

**THE HONOURABLE  
G.B. MAUGHAN, J.S.C.**

**RECHERCHES INTERNATIONALES QUÉBEC  
Petitioner**

**V.**

**CAMBIOR INC.L  
Respondent**

**And**

**HOME INSURANCE**

**And**

**GOLDER ASSOCIÉS LTÉE  
Co-Respondents**

**JUDGEMENT**

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## INTRODUCTION

One of the worst environmental catastrophes in gold mining history occurred in the tiny South American country of Guyana the night of August 18 and 19 1995. The dam of the effluent treatment plant of a gold mine ruptured. Some 2.3 billion litres of liquid containing cyanide, heavy metals and other pollutants spilled into two rivers, one of which is Guyana's main waterway, the Essequibo.

The disaster has resulted in the institution of class action proceedings in Quebec. The 23,000 Guyanese victims of the spill are suing Cambior Inc. for \$69,000,000. Cambior is a Quebec corporation. It is also a 65% owner of Omai Gold Mines Limited (Omai), the Guyanese corporation which owns the mine.

The report of the Commission of Inquiry named by the Government of Guyana shortly after the disaster depicts the reaction of many of the citizens of Guyana shortly after the disaster depicts the reaction of many of the citizens of Guyana whose very existence depends on the integrity of the Essequibo River: shock, fear, anger and in some cases panic and terror. The emotional response was heightened by the fact that the water of the Essequibo river now contained cyanide. Etched in the memories of many Guyanese was no doubt the macabre tragedy of Jonestown, Guyana in 1978 when over 900 cult followers committed suicide by ingesting lethal quantities of a cyanide laced brew.

The conclusions which the Commission drew from its inquiry are in no way binding on the Court. Yet, they do provide useful background information to the class action. The Commission found that the cause of the discharge of effluent from the treatment plant was the erosion of the core of the dam due to faulty construction of the rockfill from which the dam was built. The Commission also found Omai responsible for the loss since it was the party that brought cyanide, a noxious substance, to its property.

To assist the Guyanese who suffered damage as a result of the spill, Recherches Internationales Québec (RIQ), a Quebec company, was formed. On February 21 1997, it filed in the Quebec Superior Court a Motion for Authorization to Institute a Class Action on behalf of the victims.

Cambior contests, by way of Declinatory Exception, the jurisdiction of the Court to try the issues which RIQ raises in the class action. It says that RIQ's Motion does not disclose on its face that the Superior Court has jurisdiction over the subject matter alleged in the Motion. Alternatively, it submits that if the Court does have jurisdiction, it should decline to exercise it since the courts of Guyana are a much more convenient forum to hear and decide the questions of fact and law which the class action raises.

These are the two sole issues before the Court. If the Court concludes on the first issue that it does not have jurisdiction,

it must necessarily dismiss RIQ's Motion for Authorization and the second issue becomes academic. If it finds that it does have jurisdiction, it must then determine whether, exceptionally, it should decline to exercise it in the event it considers that the courts of Guyana are in a better position to decide the issues pursuant to Article 3135 C.C.Q.

Cambior has undertaken not to invoke any ground based on forum *non conveniens* if the Court grants its Declinatory Exception and the victims of the spill institute suit in Guyana.

## SUMMARY OF THE COURT'S FINDINGS

The courts of both Quebec and Guyana have jurisdiction to try the issues. However, neither the victims nor their action has any real connection with Quebec. The mine is located in Guyana. That is where the spill occurred. That is where the victims reside. That is where they suffered damage. But that is not all. The law which will determine the rights and obligations of the victims and of Cambior is the law of Guyana. And the elements of proof upon which a court will base its judgement are located primarily in Guyana. This includes witnesses to the disaster and the losses which the victims suffered. It also includes the voluminous documentary evidence relevant to the spill and its consequences.

These factors, taken as a whole, clearly point to Guyana, not Quebec, as the natural and appropriate forum where the case should be tried.

Nor does the Court find, as RIQ suggests, that the victims will be denied justice should it decline to exercise its jurisdiction. It is true that if the case is to be heard in Guyana, the victims will lose the benefit of the class action vehicle available to them in Quebec. However, it cannot be said that the victims are left without an adequate recourse in Guyana. They have available to them what is known as a representative action. Although this remedy does not appear to provide the victims with the same procedural and evidentiary advantages as a class action it does permit them to sue Cambior collectively. They can also proceed by way of individual actions, should they so choose.

Lastly, the Court is of the opinion that Guyana's judicial system would provide the victims with a fair and impartial hearing. It thus rejects RIQ's proof that the administration of justice is in such a state of disarray that it would constitute an injustice to the victims to have their case litigated in Guyana.

## THE STATUS OF THE PROCEEDINGS

To put Cambior's Declinatory Exception in its proper context, two preliminary comments are in order.

First, the parties agreed that they would proceed with the Declinatory Exception before the hearing on RIQ's Motion

for Authorization to Institute a Class Action. In fact, pursuant to a 1982 amendment to the Code of Civil Procedure<sup>1</sup>, a defendant may present preliminary exceptions against the representative of a class prior to the judgement granting the motion seeking authorization to proceed by way of class action. In accepting to hear and decide Cambior's Declinatory Exception in accordance with the agreement reached between the parties, the Court notes that the issues Cambior raises are not related to those which the Court eventually will be called upon to resolve pursuant to Article 1003 C.C.P. when the Motion of Authorization is presented for adjudication.

Second, since Cambior filed its Declinatory Exception on July 17 1997, RIQ has amended its Motion for Authorization by adding Home Insurance, Cambior's insurer, and Golder Associates, a geotechnical consultant invoked in the construction of Omai's effluent treatment plant, as Co-Respondents. While neither has filed a Declinatory Exception, both have reserved, with RIQ's consent, their right to do so. Whether they will, remains an open question.

#### JURISDICTION

Both RIQ and Cambior made extensive proof with respect to the corporate entity which could be held responsible for the spill in the event fault, causality and damages are proved to the satisfaction of the Court.

Cambior submits that RIQ made its bed by suing Cambior, not Omai. It adds that Cambior committed no fault which could give rise to an action by the victims against it and that, as majority shareholder, it is not responsible for any acts of negligence which Omai may have committed. The Court, therefore, lacks jurisdiction by reason of the subject matter of the litigation and the action should be dismissed pursuant to Articles 163 and 164 C.P.C.

In support of this argument Cambior relies principally on the following set of facts:

1. Cambior and Omai are not "one and the same" as RIQ would have the Court believe. Cambior had no responsibility for construction, maintenance, operation and management of the mine and its effluent treatment plant (also known as a tailings pond), as RIQ alleges. Nor is it the case that Cambior made the principal decisions effecting the daily operations of the mine.
2. Before the mine, was built, Omai and its three shareholders (Cambior, Golden Star Resources (GSR) and the Government of Guyana) entered into a mineral agreement. The agreement is proof that Omai, and only Omai, would be responsible for the design, construction and operation of the mine.
3. Despite the fact that Cambior was Omai's majority shareholder, the mineral agreement stipulated that Omai would operate as a distinct corporation entity.
4. Cambior acquired extensive powers and duties as "managing member" under the mineral agreement. They included assisting Omai in the daily operations of the mine; causing Omai to prepare work programmes relating to the development and operations of the mine under Cambior's direction; the preparation of budgets; and directing Omai in the execution of all decisions of Board. However, no matter what the written documentation says, as Omai evolved, it acquired the personnel, expertise and ability which allowed it over time to assume the duties which the mineral agreement assigned to Cambior.
5. Cambior was not a party to the contracts entered into with consultants and contractors for the design and construction of the mine and, in particular, the tailings pond. Omai was.
6. The Senior Officer of Omai in charge of all of its operations reports directly to Louis Gignac in the latter's capacity as Omai's President and Chairman of the Board.
7. Even though Cambior appoints four of the six members of Cambior's Board, each is required by the law of Guyana to act in Omai's best interests, not those of the appointing shareholder.
8. The services which Cambior furnishes to Omai are minimal. They are billed to Omai and amount to no more than \$200,000 to \$300,000 per annum.
9. Of the 1,000 employees of Omai, only 10 were once employed by Cambior.
10. Since Omai's incorporation on August 15 1991, no Cambior employees have been involved in any aspect of the design or construction of the tailings dam.
11. In addition to damages of \$69,000,000, RIQ is seeking an injunction against Cambior obliging it to restore the ..... Guyanese environment to its original condition., Since an injunction emanating from a Quebec court has no extraterritorial effect, the Court has no jurisdiction to decide this aspect of the case.

According to Cambior, these facts are proof that RIQ has no sustainable recourse against Cambior. Therefore, the class action which RIQ wishes to exercise against Cambior is not founded on any subject matter over which the Court has jurisdiction. Since Article 164 C.P.C. says that lack of jurisdiction by reason of the subject matter may be raised "at any stage of the case", RIQ's proceedings against it should be dismissed now.

<sup>1</sup> 1982, c.37, Art.21

The Court does not agree.

First, the Court is satisfied that it does have jurisdiction to bear the Motion for Authorization and, if granted, the class action which follows, pursuant to Articles 3134, 3148 (1) and 3148 (3) C.C.Q. These articles read as follows:

3134. In the absence of any special provision, the Quebec authorities have jurisdiction when the defendant is domiciled in Quebec.

3148. In personal actions of a patrimonial nature, a Quebec authority has jurisdiction where

- (1) the defendant has his domicile or his residence in Quebec;
- (2) a fault was committed in Quebec, damage was suffered in Quebec, an injurious act occurred in Quebec or one of the obligations arising from a contract was to be performed in Quebec.

It is clear that Cambior has its domicile in Quebec. In addition, if the Court grants RIQ's Motion, the class action will proceed against Cambior as a "personal action of a patrimonial nature". Moreover, if it is the case that Cambior made certain decisions relating to the construction and operation of the mine which resulted in the failure of the tailings dam, those decisions would have been made in Quebec where Cambior's Board meets.

Second, the Court is of the opinion that the issue of Cambior's personal liability to RIQ cannot be raised in the context of a hearing on a declinatory exception. It is sophistic for Cambior to say, in one breath, that the Court does not have jurisdiction over the subject matter of its liability to RIQ and, in the next breath, to ask the Court to decide this very issue.

Lastly, the Court is not seized at this juncture with a trial on the merits of RIQ's action. Nor is it seized with a Motion for Authorization to institute a Class Action where the issue of Cambior's liability might be relevant in determining whether the Motion seems to justify the conclusions sought pursuant to Article 1003 (b) C.P.C. And just as Cambior made proof that it did not exercise effective control over Omai and did not act as Omai's directing mind, RIQ made proof to the contrary.

For example, RIQ pointed out the Cambior financed the study which determined that the mining project would be economically feasible. The study also contained a basic design concept for the tailings pond which was later built in accordance with this concept. As for Mr. Gignac, as President and Chairman of the Board of both Cambior and

Omai, he made all strategic decisions relating to Omai's operations. What was good for Omai, says RIQ, was good for Cambior. For all intents and purposes, Omai was nothing more than a Cambior show.

The testimony of Mr. Gignac, affidavit evidence and documentary proof produced by both parties might enable the Court to draw certain preliminary conclusions regarding Cambior's liability, as principle, for the acts of Omai, as agent. However, it would be premature to do so. In fact, it would not be fair to either party for the Court to make a final determination on the issue of Cambior's liability until all evidence relating to the causes of the spill is on the table.

The Court thus concludes that it has jurisdiction to decide the class action proceedings before it. The question which remains to be answered is whether it should decline to exercise jurisdiction in favour of the courts of Guyana.

#### *FORUM NON CONVENIENS*

The well-established common law doctrine of *forum non conveniens* was incorporated into the Quebec Civil Code under Article 3135 on January 1, 1994. It reads as follows:

3135: Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide.

The threshold question in any *forum non conveniens* inquiry is whether another country also has jurisdiction to try the issues raised before a Quebec Court. The proof in this case is that the courts of Guyana do have such jurisdiction. The High Court of Guyana tries in first instance actions founded on torts committed within the jurisdiction and injunctions whether damages are or are not also sought in respect thereof. The High Court also has jurisdiction over foreign parties, whether plaintiffs or defendants.

In determining whether exceptional circumstances exist which would permit a Quebec court to decline jurisdiction in favour of a foreign authority, the Quebec Minister of Justice set forth the following guidelines.<sup>2</sup>

Cet article, de droit nouveau, codifie l'exception du *forum non conveniens*, fréquemment utilisée dans les systèmes de common law.

Le *forum non conveniens* permet, en effet, à un tribunal de décliner sa compétence quant il juge que les intérêts de la justice seraient mieux servis si l'affaire don't il est saisi était instruite par un autre tribunal.

<sup>2</sup> Québec, Ministère de la justice, *Commentaires du Ministre de la justice: le Code civil du Québec*, Vol. 2, Québec: publication of Québec, 1993, pp. 1999-2000

Pourraient donner ouverture à ces cas exceptionnels, les considérations suivantes : 1 disponibilité des témoins, l'absence de familiarité de l'autorité appelée à trancher le litige avec le droit applicable, la faiblesse du rattachement du litige à cette autorité, le litige se trouvant en relation beaucoup plus étroite avec les autorités d'un autre État.

As Madam Justice Mailhot points out in *Droit de la famille - 2577*<sup>3</sup>, common law precedents also serve as a useful guide in interpreting Article 3135. She refers, in particular, to the Supreme Court of Canada judgment in *Amchem Products Inc. v. B.C. (W.C.B.)* where Mr. Justice Sopinka, agreeing with English authorities on this point of law, states that the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff.<sup>4</sup>

Sopinka J. makes several further comments with respect to the doctrine of forum non conveniens which are relevant to the present case. For example, he states that the topic has become of increasing modern importance as a result of the ease of communication and travel; the tendency of courts in many countries to extend their jurisdiction over events and persons outside their territory; and a greater awareness of foreign laws and procedures which, in turn, may lead to forum shopping.<sup>5</sup>

He adds, however, that forum shopping is not to be encouraged. The choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties and not to secure a judicial advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate.<sup>6</sup>

Citing with approval certain statements made by the House of Lords on this issue in *Spiliada Maritime Corp. v. Cansulex Ltd.*<sup>7</sup>, Sopinka J. adds that the "natural form" where a case should be tried as the one with which the action has the most and real substantial connection.<sup>8</sup> If this first condition is established, a stay will be granted in favour of the defendant unless the plaintiff establishes special

circumstances by reason of which justice requires that the trial take place in the jurisdiction where the plaintiff sued.<sup>9</sup>

Of particular interest and relevance to the present case are his comments to the effect that the mere loss of a judicial advantage to the plaintiff will not amount to an injustice if the Court is satisfied that substantial justice will be done in the appropriate forum.<sup>10</sup> In this regard, the House of Lords in *Spiliada* days that plaintiffs must establish "objectively by cogent evidence" that they will not obtain justice in the foreign jurisdiction, before a court should give weight to this argument.<sup>11</sup>

United States Federal Courts apply similar principles in actions in those courts. For example, the Supreme Court of the United States approved a lower court decision dismissing an action brought in California by the estates of Scottish citizens in an air crash in Scotland against the American manufacturers of the aircraft.<sup>12</sup> While giving due consideration in its *forum non conveniens* inquiry to the plaintiff's choice of California, the Court decided that other relevant factors clearly pointed to a trial in Scotland, the alternative jurisdiction. Thus the weight of the plaintiff's choice of forum was lessened since their home forum was not selected. Nor did the U.S. Supreme Court give substantial weight to the fact that the plaintiffs would lose many of the advantages which they would enjoy if the case remained in California, such as the laws regarding strict liability, the capacity to sue and generally higher damage awards.

With these broad principles in mind, what then are the factors which the Court should consider in determining whether it should keep or decline jurisdiction?

Madam Justice Mailhot<sup>13</sup>, Mr. Justice Rochon<sup>14</sup>, Mr. Justice Guthrie<sup>15</sup>, adopt the factors of Madam Justice Richer<sup>16</sup> adopt the factors of Madam Grenier in *Banque Toronto Dominion v. Arseneault* which she sets out as follows:<sup>17</sup>

D'exécution du contrat qui donne lieu à la demande; 4) l'existence et le contenu d'une autre

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3 C.A.M., No. 500-09-000536-953, December 9, 1996, p.6

4 [1993] 1 S.C.R. 897, 921

5 Id., note 4, 904

6 Id., note 4, 912

7 [1987] A.C. 460

8 Id., note 4, 916

9 Id., note 4, 917

10 Id., note 4, 917

11 Id., note 7, 478

12 *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)

13 Id., note 3, 10

14 H.L. Boulton & Co. S.A.C.A. v. Royal Bank of Canada, [1995] R.J.Q. 213, 221 (S.C.)

15 *Simcoe & Erie General Insurance Co. v. Arthur Andersen Inc.* [1995] R.J.Q. 2222, 2228 (S.C.)

16 *Amiouny v Avalon Beverage Co.*, J.E. 97-2181, p. 9(S.C)

17 [1994] R.J.Q. 2253, 2255 (S.C.)



action intentée à l'étranger et le progrès déjà effectué dans biens appartenant au défendeur; 6) la loi applicable au litige; 7) l'avantage don't jouit la demanderesse dans le for choisi; 8) l'intérêt de la justice. Aucun de ces facteurs n'est déterminant en soi. Il faut rechercher un juste équilibre en tenant compte de l'ensemble des faits mis en preuve.

With one modification, the Court accepts these factors as being relevant to the present case. Since RIQ's action is based not on a contract but rather an extra-contractual fault, the third factor should read, for this case, "The place where the fault occurred".

Before analyzing these factors in the context of the present case, the Court emphasizes that its decision to assume or decline jurisdiction is not made by adding up on a scorecard the factors which weigh in favour of or against each party. As Mr. Justice La Forest of the Supreme Court of Canada stated in *Hunt v. T. & N PLC*<sup>18</sup>:

Whatever approach is used, the assumption of and the discretion not to exercise jurisdiction must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contracts or connections.

## 1. The residence of the parties and the witnesses

### a) *The parties*

RIQ is a Quebec corporation with its head office and principal place of business in Quebec. However, the primary, if not sole purpose of RIQ's incorporation was to act in the present class action proceedings as the vehicle for the proposed class of 23,000 Guyanese victims of the spill. All three "designated members" of RIQ, within the meaning of Article 1048 C.P.C., are also residents of Guyana. Like the other victims, they have no link with Quebec other than as a result of the present litigation. Cambior, of course, has a major presence in Quebec. Its head office is in Val d'Or. Its executive offices are in Montreal. Minutes of Board meetings and corporate records are located in Quebec.

RIQ has made it clear that, in addition to Mr. Gignac, it intends to call as witnesses many other Board members and executive officers of Cambior in an attempt to pierce the corporate veil and establish that Cambior is responsible for any fault which Omai committed which caused the victims' losses.

RIQ lays great emphasis in its argument on the location of Cambior's domicile being in Quebec. It submits that this fact alone makes Quebec the "natural forum" for the litigation.

The Court agrees that a defendant's domicile is an important factor to be considered in a *forum non conveniens* inquiry. However, this factor alone must be put in its proper perspective. First, the Court notes that neither Article 3135 nor any other provision of the Civil Code dealing with the international jurisdiction of Quebec authorities states that in a *forum non conveniens* inquiry the Court should give more weight to the domicile of the defendant than to any other factor which gives Quebec courts international jurisdiction. Second, the Court is not aware of any rule of private international law which suggests that the natural forum is where the domicile of the defendant is located. As Rochon J. points out<sup>19</sup>:

.... il est inexact d'affirmer en droit international privé que le domicile du défendeur constitue le forum naturel. Cette confusion tire son origine du fait que l'on utilise ou du moins que l'on tenterait d'utiliser l'enseignement de la jurisprudence antérieure au 1<sup>er</sup> janvier 1994 en droit privé intérieur pour l'appliquer aux principes du droit international privé, en ce qui a trait aux nouvelles règles en vigueur depuis le 1<sup>er</sup> janvier 1994.

Dans l'ensemble des arrêts provenant du droit international privé, l'on ne définira pas d'ailleurs le forum naturel comme étant le domicile due défendeur. L'on emploiera, il est vrai, le terme «forum naturel», mais dans un tout autre contexte.

As for the two other parties to the litigation, Co-Respondents Golder Associates and Home Insurance, both have places of business in Quebec. However, according to RIQ, the three individuals from Golder who will be called upon to testify reside in Toronto where Golder's head office is located. The testimony of the representatives of Home Insurance who may be called upon to testify will likely be limited to the insurance protection which Cambior procured for the project.

On balance, the Court is of the view that the residence of the parties favours Guyana over Quebec as the appropriate forum for this litigation. Quebec is hardly the home forum of the victims of the spill. Guyana is. Nor does the Court consider that the location of Cambior's domicile in Quebec is a factor of significant importance. The inconvenience to the victims of having to litigate in Quebec is far greater than that of Cambior's Board members and executive officers who would be called upon to testify in Guyana.

### b) *Other witnesses*

RIQ lists 40 witnesses, apart from the representative of the three Respondents, who will be called upon to prove Cambior's fault. These witnesses will give evidence on

18 [1993] 4 S.C.R. 289, 326

19 *Id.*, note 14, p. 221, 222

engineering relating to the construction and design of the tailings dam; environmental matters; the feasibility of the Omai mining operation; project financing; mine construction; management and supervision; and the managing of events during and after the spill. Fifteen are located in Vancouver, ten in the U.S., five in Ottawa, five in Montreal, four in England, and one in Edmonton.

Of the 40 witnesses, only ten – those residing in Montreal and Ottawa – are compellable by a Quebec court. Presumably, none of the 40 are compellable in Guyana. While transportation and lodging would be expensive in both jurisdictions, the proof indicates that the travel costs for the 40 witnesses to and from Guyana would be greater than the cost of travelling to and from Montreal. Compared to the overall cost of the litigation, these costs would be relatively insignificant.

To what extent RIQ's list of witnesses may change over time remains to be seen. For example, it lists the names of five witnesses from one company and six from another who will be called upon to testify. The presence of all these witnesses will likely not be necessary.

Conspicuous by their absence from RIQ's list are the names and places of residence of those witnesses whom RIQ will be required to call to prove damages and causality. Many no doubt are members of the proposed class of victims. Whether they are or not, it can be assumed that a significant number reside in Guyana since this is where the damages resulting from the spill occurred.

By way of illustration, RIQ alleges in its Motion for Authorization that the 23,000 victims reside, work, fish or own property within the environmental disaster zone and that they have suffered physical damage associated with the long-term health risks caused by the spill and the contamination of the Essequibo River. The Essequibo River is the victims' principal transportation route, their most readily available potable water supply and their source of water for bathing, washing clothes and dishes. It also provides them with general enjoyment and pleasure. And it is also the habitat of numerous species of fish and other aquatic life forms which comprise a staple of the Guyanese diet.

RIQ also claims on behalf of the victims psychological damage associated with the presence of cyanide in the Essequibo River; economic damage due to the effects of the spill on local and international markets for fish, livestock, game and produce harvested from the Essequibo River and its banks; and environmental damage associated with the loss of sensitive and pristine ecosystems.

Who other than Guyanese residents are going to prove the discontinued use of river water for drinking and washing; reduced food supplies; the economic effects of the spill on

individual households and towns bordering the Essequibo River; business losses; decreased fishing activity; and many of the other losses suffered by the local population as a result of the spill? To answer the question is to answer it.

Lastly, but not to be forgotten, is the fact that the Commission of Inquiry has already investigated and reported on much of the evidence which undoubtedly will be heard by either a Guyanese or a Quebec court. All six members of the Commission are Guyanese. Of the 20 members of three specialised committees which the Government of Guyana appointed to investigate specific areas of concern, 14 are residents of Guyana. Many of the members of the committees are mining, consulting and geotechnical engineers, dam construction specialists, economists, environmental specialists and doctors. The extent to which the parties will call upon their particular expertise is not yet known. That said, it is logical to assume that a number of these experts will be examined or cross-examined on the facts which they have already reported on and on the opinions they formed in carrying out their mandate.

In a word, the Court is of the view that the location of witnesses clearly favours Guyana as the appropriate mandate.

## **2. The location of the elements of proof**

Most, if not all, of the elements of proof are located in Guyana: the rivers into which the effluent spilled; the plans and documentary evidence relating to the construction of the mine and the tailings dam; the medical records of the victims; government records relating to the mine, the spill and the effects thereof; statistical and other back-up documentation upon which the Commission of Inquiry and the specialized committees relied for the purpose of preparing their reports on the spill; business records to prove economic loss; and last, but not least, the mine itself.

It is true that the parties can transport much of the documentary proof to Quebec for discoveries and trial. Yet, the inconvenience of doing so is considerable when compared with the relative ease of access to sources of proof in Guyana and the right of a Guyanese court to compel unwilling witnesses residing in Guyana.

It is also true, as RIQ points out, that the tailings pond has been repaired and once again in operation. Therefore, a visit to the dam site may be of limited value. However, if a viewing is called for, a Guyanese judge is in a far better position than a Quebec judge to direct and supervise a visit. What's more, just as a Quebec judge would have a greater appreciation than a Guyanese judge of the social and economic consequences of a spill contaminating the St. Lawrence River, a Guyanese judge can much better assess the impact of the discharge of effluent into the Essequibo River.

### 3. The place where fault occurred

RIQ says that one or more faults and injurious acts occurred in Quebec within the meaning of Article 3148 (3) C.C.Q. It refers, in particular, to the various decisions which Cambior made with respect to the design, construction, management and operation of the mine and tailings pond.

That may be so. But it is a fact that Omai managed and operated the mine on a daily basis in Guyana. It was also built in Guyana, even though it may have been designed elsewhere. And, as trite as it is to say, the erosion of the core of the dam occurred in Guyana. Any act of negligence in the construction, management and operation of the mine which Omai committed and for which Cambior, as principal, could be held liable would have occurred in Guyana.

To conclude, the criterion of the place of the fault or faults giving rise to the victims' claim favours Guyana over Quebec as the appropriate forum.

### 4. Pending litigation

As many as 900 of the victims have already filed claims in Guyana against Omai. A quarter of these have been settled. In addition, approximately 250 individuals have the files writs against Omai.

The courts of Guyana have thus already been seized of litigation arising out of the spill. That said, the court gives little weight to this factor in the present inquiry. The actions name Omai as a defendant, not Cambior. Therefore, as matters now stand, there would be little risk of contradictory judgements emanating from the courts of Guyana and Quebec.

### 5. The location for the defendants' assets

Cambior has assets in both Quebec and Guyana. Cambior's assets in Guyana consist of common and preferred shares in Omai and its rights as a creditor under loan facilities extended to Omai. According to the proof before the Court, the value of such assets is sufficient to satisfy any adverse judgement against Cambior in Guyana.

In either jurisdiction the victims should have little difficulty in executing a successful judgement.

### 6. The law applicable to the litigation

The parties do not contest that the law of Guyana applies. This is so even if the damages suffered by the victims in Guyana may have resulted from certain decisions made by Cambior in Quebec, as RIQ alleges. In this regard, the first paragraph of Article 3126 C.C.Q. reads:

3126. The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the latter country is applicable if the person who committed the injurious act should have foreseen that the damage would occur.

There is little doubt in the present case that if it is proved that Cambior made decisions in Quebec which caused injury in Guyana, Cambior knew that that is where the injury would occur.

Mr. Kenneth George, the Chairman of the Commission of Inquiry and a former Chief Justice of Guyana testified before the Court on the law of Guyana. Since at the time of the spill there was little or no Guyanese environmental legislation in force, he is of the opinion that the Guyanese law applicable to the victims' claim is that common law on mass torts.

The mineral agreement also provides that Omai is bound by those environmental standards set forth in an Environmental Impact Statement which an independent consultant prepared for the parties to the agreement. In addition to establishing the standards which Omai was required to respect, the Statement describes the anticipated impact of the mining project on various aspects of the Guyanese environment.

Nothing would prevent a Quebec Court from interpreting the common law on mass torts which applies to the victims' claim against Cambior. Nothing would prevent it either from determining whether the common law on mass torts permits the victims' who were not parties to the mineral agreement, to invoke a breach by Omai of the environmental standards set forth in the Statement, in support of its action against Cambior. In fact, the very essence of the provisions of the Quebec Civil Code on private international law is that Quebec courts will apply foreign law in many varying circumstances. But that is not the issue before the court. Rather, the issue is whether a Guyanese court is in a better position to do so and, obviously, it is.

### 7. The advantages to the plaintiffs of suing in their chosen forum

Undoubtedly, the most distinct advantage for the plaintiffs of suing in Quebec is the availability of the class action procedure. Cambior says that the same remedy, known as a representative action, is available to the victims in Guyana. However, the Court is not satisfied on the proof before it that this is so. The advantages to plaintiffs who use this procedural vehicle in Guyana pale in comparison to those available to plaintiffs who sue under Quebec's class action legislation.

The first distinction is that Order 14, Rule 8 of the Rules of the High Court of Guyana limits representative actions to persons having the “same interest” in a litigatio. Contrast this with Article 1003 (a) C.P.C. which allows persons whose recourses raise “identical, similar to related” questions of law or fact to bring a class action. Mr. Justice Rothman of the Quebec Court of Appeal has given this provision of law a broad interpretation<sup>20</sup>:

But Article 1003 (a) does not require that all of the questions of law or of fact in the claims of the members be identical or similar or related. Nor does the article even require that the majority of these questions be identical or similar or related. From the text of the article, it is sufficient if the claims of the members raise some questions of law or of fact that are sufficiently similar or sufficiently related to justify a class action.

No proof was made whether the High Court of Guyana would interpret Order 14, Rule 8 liberally or restrictively. The extent to which the 23,000 victims may have the “same interest” in litigation against Cambior in Guyana, therefore, remains unknown. This is not surprising since there is little case law on this point in Guyana. Cambior and its five experts on Guyanese law could identify no more than three representative actions which have been tried in Guyana since the early 1950’s. The last one dates back to 1992.

The second distinction relates to the manner in which the victims of the spill will be obliged to prove their damages should the litigation proceed in Guyana.

Contrast this with Quebec class actions where proof of the damage caused by the defendant to each plaintiff is not a pre-requisite to a successful recovery. According to Article 1031 C.P.C., if the evidence enables a court to establish with sufficient accuracy the total amount of the claims of the members of the class, it may order collective recovery. If circumstances so require, the Court may order individual liquidation of claims, but in doing so, it may determine special modes of proof and procedure pursuant to Article 1039 C.P.C.

As Rothman J. further points out, the class action recourse is a particularly useful remedy in cases of environmental damage<sup>21</sup>. While the amount of damage for the harm done to each plaintiff may be small, the class action is a relatively inexpensive means for dealing collectively with claims for compensation. Unfortunately for the victims, the representative action, as described by Mr. George, does not seem to provide the same flexibility.

This does not mean, however, that the victims would be left without an adequate recourse in Guyana. If the door to

the representative action is closed to some or all of them, they still have the right to institute individual actions against Cambior before the High Court of Guyana and make whatever proof is required by the laws of Guyana to establish Cambior’s fault, their damages and causality. In this regard, it must be remembered that Quebec class action legislation is still unique in the sense that many other jurisdictions still have chosen not to enact such legislation. In Canada, only two other Canadian provinces (Ontario and British Columbia) provide plaintiffs with such a recourse.

Based on these considerations, it is hardly surprising that RIQ chose Quebec as the forum for this litigation. But the question which must be answered is whether this choice becomes the overriding factor in the present inquiry. The Court rejects this proposition.

The authorities, as cited above, are clear that forum shopping is to be discouraged to avoid parties seeking out a jurisdiction simply to gain a juridical advantage when they have little or no connection with that jurisdiction<sup>22</sup>. Applying this principle to this case, the victims, all Guyanese residents, have no legitimate claim to the advantages of the Quebec forum and its class action legislation. This is because the six connecting factors, taken together, and which the Court has already discussed above, point to Guyana as being the natural forum for this litigation. The ties which bind the victims to Quebec are tenuous, at best.

If the Court were to ignore the traditional connecting factors established by the jurisprudence and give conclusive or substantial weight to the differences which exist between the laws of Guyana the laws of Quebec, it would have to embark on a study of comparative law. This would encompass a review and interpretation of the laws of Guyana. It would also entail a comparison of the substantive laws and rules of proof and procedure in both jurisdictions. After conducting such an analysis, the Court would grant Cambior’s Declinatory Exception only if it could conclude that the laws of Guyana were at least as favourable to the victims as the laws of Quebec.

## 8. The interests of justice

RIQ claims that the victims will be denied justice if the case is heard in Guyana. In support of this proposition, it relies on the testimony of William Schabas, a Quebec law professor. Professor Schabas conducted what he referred to as a “one-week fact-finding mission to Guyana” where he attended trials and met with government officials, lawyers, judges and law professors. He would have the Court believe that Guyana is little more than a judicial

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20 Comté d’environnement de La Baie Inc. v. Société d’Électrolyse et de la Chimie Alcan Ltée..., [1990] R.J.Q. 655, 659 (C.A.)

21 Id., note 20

22 Supra, p. 16

backwater such that a refusal by the Court to exercise its jurisdiction by referring the case to the courts of Guyana would likely result in a violation of the victims' human rights and a denial of justice.

Professor Schabas' comments about Guyana's legal system are scathing. He describes Guyana's pre-1992 judicial system as nothing more than an appendage of the repressive administrative dictatorship it served. He compares it to the systems of justice which prevailed in South Africa during the worst excesses of the apartheid regimes in the 1970's and 1980's and in Nazi Germany where the concept of the rule of law did not exist. He adds that since 1992 Guyana has been doing little more than "tottering along the road to democratic development and to the restoration of the rule of law" and that recovery has been slow.

Citing a memo addressed to the Attorney General by a lawyer he met during his trip, he says that "the administration of law in Guyana has reached a state of collapse". Citing Prime Minister Janet Jagan in a March 1997 interview, he describes the country's judiciary as "corrupt". (She later recanted this statement). Citing the present Chief Justice of the High Court, he says that the judiciary is demoralized. Citing the 1996 U.S. State Department Country Report on Human Rights, he says that "the inefficiency of the judicial system is so great as to undermine due process". He also cites Mr. George whom he met on his trip. Mr. George would have told him that he is "scandalized" by the salaries that Guyanese judges receive and that this prevents the government from appointing good candidates to the Bench.

With respect to procedural delays, Professor Schabas claims that it could take four to five years to get a court date. He says this is so because there are not enough judges to hear cases and because judges work slowly, one of the reasons being that they are dissatisfied with their low salaries and thus give less than their full effort.

Lastly, with respect to representative actions, Professor Schabas suggests that they are limited to recourses by unincorporated bodies such as clubs, labour unions and bondholders.

If the Court were to accept Professor Schabas' evidence at face value, it would have little hesitation in dismissing Cambior's Declinatory Exception. The picture Professor Schabas portrays is such that the victims could hardly expect to receive substantial justice before a Guyanese court. The difficulty with assessing this proof, however, is that it is based primarily, if not exclusively, on secondary sources. While the Court recognizes Professor Schabas' expertise in the field of international human rights, it questions the accuracy of many of his opinions on Guyana's system of justice which are not based on any first hand knowledge.

Cambior's evidence on the same issues tells a different story.

Mr. George suggests that some of the comments of Professor Schabas border on the defamatory. Throughout his long association of 40 years with the legal profession in Guyana, he is not aware of any serious allegations which have ever been made concerning the integrity or competence of those who have been called to the Bench. He does not know what Professor Schabas means by the term "administrative dictatorship" but says that from the time Guyana obtained its independence from England in 1966 the country has been served by strong and independent attorneys general. As far as Mr. George is aware, the rule of law has always been observed in Guyana. And as a judge for 29 years, he was never under any pressure to decide a case in accordance with the dictates of a political directorate. Nor did any of his colleagues ever make complaints to him in this regard.

Mr. George denies that he told Professor Schabas that he was "scandalized" by the level of judges' salaries. While he acknowledges that he said that there is room for substantial improvement, he would have added that they compare favourably with the salaries paid to permanent secretaries in government ministries. He also takes umbrage at the suggestion that judges are work-shy. While agreeing that the system does not currently possess many judges of superlative quality, he hastens to add that Guyanese judges are a group of dedicated and committed individuals acutely conscious of their image and the need to maintain the highest level of integrity.

Citing relevant common law jurisprudence, he denies Dr. Schabas' suggestion that representative actions are limited to unincorporated bodies. He also confirmed that a case will be heard between two and two and a half years after it has been inscribed for hearing. Nor is it uncommon for the court to shorten these delays in certain types of cases.

The Court was particularly impressed with the quality of Mr. George's evidence. To say the least, his legal credentials are beyond dispute. He testified in a very direct manner and without hyperbole. When he did not know the answer to a question, he so stated. Nor was he afraid to admit certain shortcomings of Guyanese law, such as the representative action, and of Guyana's legal system. In a word, the Court prefers Mr. George's testimony of that of Professor Schabas.

Several distinguished jurists corroborate Mr. George's testimony. Guya Persaud, a former judge of the High Court of Guyana and former Chief Justice of the Guyana Court of Appeal, endorses both the fairness and competence of judicial appointments. As a member of the judicial Service Commission for fifteen years, he states that he is not aware of any attempt by the Government to influence the Commission in its appointments or to tamper with the judiciary. This is because under the Constitution of Guyana, the present members of both the High Court and the Court of Appeal are persons of integrity and learning and competent to try a case such as the one contemplated in

the proceedings before this Court. He also confirms that Guyanese lawyers and judges and the administration of justice system in Guyana generally would dispense justice of a high quality in the present case.

Sir Harold Bernard St. John, a barrister from Barbados and former Prime Minister of Barbados, also takes exception to the comments of Professor Schabas. He too testifies as to the quality of lawyers and judges in Guyana and confirms that Guyanese judgements are well regarded in the Commonwealth Caribbean and are cited approvingly in other jurisdictions. He credits the strength of Guyanese legal institutions as having been crucial in the preservation and enhancement of the rule of law during a period in Guyana's recent history when the executive attempted to exercise absolute power.

Lastly, Mr. Marcel Nichols, a former Justice of the Quebec Court of Appeal and now a lawyer in private practice, made his own six day trip to Guyana. Following on the heels of Professor Schabas, he too conducted an investigation of Guyana's judicial system. Both his affidavit and his oral testimony contradict much of what Professor Schabas had to say with respect to the organization of the courts of justice, the efficiency and quality of the judges named to the Bench and of their reported decisions, and he independence of the judiciary.

Paragraphs 143 and 144 of his affidavit are particularly relevant:

143 Ma propre perception de l'indépendance judiciaire est que les juges Guyanais sont fidèles à la tradition britannique et sont jaloux de l'indépendance que la Constitution du pays leur assure en décrétant leur inamovibilité.

144 ...les cours de justice de Guyana tant dans leur composition que leur fonctionnement, seraient en mesure de s'occuper impartialement et efficacement d'un recours collectif de la nature de celui que celui que les requérants cherchent à faire autoriser devant la Cour Supérieure du district de Montréal.

While the Court recognizes that Mr. Nichols' knowledge of Guyanese law is probably as limited as that of Professor Schabas, his comments do confirm, from a Quebec perspective, the opinions of those Guyanese and Caribbean jurists who were unequivocal in stating that justice would be rendered in Guyana should the Court decline to exercise its jurisdiction in the present case.

The Court recognizes that it is difficult, if not invidious, to make comparisons between two different systems of justice. At the same time, it acknowledges that, for the purpose of a *forum non conveniens* inquiry, this exercise is necessary to determine whether the remedy sought by the plaintiffs is available in the foreign jurisdiction. In the present case, RIQ has failed to bring forward any conclusive and objective evidence to substantiate its belief that Guyana is an inadequate forum due to the many deficiencies which plague its systems of justice. On the contrary, the Court is satisfied that the remedy sought by the victims is available to them in Guyana and that the delays for having their case heard in Guyana are reasonable compared to the delays that exists in this jurisdiction.

The Court thus finds, on the proof before it, that the circumstances of the case are sufficiently unusual that it would be improper for it to remain seized of this litigation. Guyana is clearly the appropriate forum to decide the issues.

FOR THESE REASONS, THE COURTS:

GRANTS Cambior's Declinatory Exception;

DECLARES that the High Court of Guyana is in a better position than the Superior Court of Quebec to decide the issues raised by RIQ's Motion for Authorization to Institute a Class Action dated February 21, 1997;

RATIFIES the undertaking of Cambior, as a condition of the granting of its Declinatory Exception, not to invoke any ground based on *forum non conveniens* before the High Court of Guyana if it is sued in any action out of the spill at the Omai Gold Mine on August 19, 1995;

ORDERS Cambior to conform to the aforesaid undertaking;

DISMISSES RIQ's Motion for Authorization to Institute a Class Action dated February 21, 1997 against Cambior;

THE WHOLE WITH COSTS.

G.B. MAUGHAN, J.S.C.

Mtre. James Hughes  
Mtre. John Michelin  
Michelin Huges  
Attorneys for Petitioner

Mtre. André Prévost  
Mtre. Jessica Elbaz  
McCarthy Tétrault  
Attorneys for Respondent



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**JUDGEMENTS – SCHALK WILLEM BURGER LUBBE (SUING AS ADMINISTRATOR OF  
THE ESTATE OF RACHEL JACOBA LUBBE) AND 4 OTHERS AND CAPE PLC. AND  
RELATED APPEALS**

**HOUSE OF LORDS**

**Lord Bingham of Cornhill Lord Steyn Lord Hoffmann Lord Hope of Craighead Lord Hobhouse of  
Woodborough**

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGEMENT**

**IN THE CAUSE**

**SCHALK WILLEM BURGER LUBBE  
(SUING AS ADMINISTRATOR OF THE ESTATE OF RACHEL JACOBA LUBBE)  
AND 4 OTHERS  
(APPELLANTS)**

**AND**

**CAPE PLC  
(RESPONDENT)  
AND RELATED APPEALS**

**ON 20 JULY 2000**

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## LORD BINGHAM OF CORNHILL

My Lords,

The central issue between the plaintiffs and the defendant in these interlocutory appeals is whether proceedings brought by the plaintiffs against the defendant should be tried in this country or in South Africa.

There are at present over 3,000 plaintiffs. Each of them claims damages in one of the 11 writs issued against the defendant between February 1997 and July 1999. All the plaintiffs claim damages for personal injuries (and in some cases death) allegedly suffered as the result of exposure to asbestos and its related products in South Africa. In some cases the exposure is said to have occurred in the course of the plaintiffs employment, in others as a result of living in a contaminated area. The exposure is said to have taken place in different places in South Africa and over varying, but sometimes lengthy, periods of time, ending for claim purposes in 1979. One of the plaintiffs (Mrs. Pauline Nel, suing as personal representative of her deceased husband) is a British citizen resident in England. All the others are South African citizens resident in South Africa. Most of the plaintiffs are black and of modest means. Instructions to sue have been given to English solicitors by more than 800 additional claimants.

The defendant is a public limited company. It was incorporated in England in 1893 under the name Cape Asbestos Company Limited, principally to mine and process asbestos and sell asbestos-related products. From shortly after 1893 until 1948 it operated a blue asbestos (or crocidolite) mine at Koegas and a mill at Prieska, both in the Northern Cape Province. In 1925 the defendant acquired the shares in two companies, both incorporated in 1916: these were Egnep Limited and Amosa Limited, which operated a brown asbestos mine and mill at Penge in Northern Transvaal. For practical purposes the head office of these companies was in Cape Town. In 1940 a factory was opened at Benoni, near Johannesburg, to manufacture asbestos products. It was owned by a wholly-owned subsidiary of the defendant.

In 1948 the corporate structure of the defendant's group was changed. The mine at Koegas and the mill at Prieska were transferred to a newly-formed South African company, Cape Blue Mines (Pty.) Limited. The shares in Cape Blue Mines, Egnep and Amosa were transferred to a newly-formed South African holding company, Cape Asbestos South Africa (Pty.) Limited (CASAP). The offices of all these companies were in Johannesburg. All the shares in CASAP were owned by the defendant. In 1979 CASAP sold its shares in Cape Blue Mines, Egnep and Amosa to an unrelated third party buyer, which shortly thereafter sold them on. The defendant continued to hold an interest in the South African companies which operated out of the factory at Benoni until 1989 (although the factory had been

closed earlier). Since then the defendant has had no presence anywhere in South Africa, and when the first of the writs in the current proceedings was served the defendant had no assets in South Africa.

Although originating in South Africa, the defendant's asbestos-related business has not been confined to that country. From 1899 the defendant operated a number of factories in England engaged in processing asbestos and manufacturing asbestos products. A factory at Barking was run by the defendant from 1913 until 1962, and then by a wholly-owned subsidiary until the factory was closed in 1968. Another subsidiary, incorporated in Italy, operated a factory in Turin which made asbestos products from 1911 until 1968, with an intermission during the war years.

Some of the claims made in these actions date back to times when the defendant was itself operating in Northern Cape Province. But the central thrust of the claims made by each of the plaintiffs is not against the defendant as the employer of that plaintiff or as the occupier of the factory where the plaintiff worked, or as the immediate source of the contamination in the area where that plaintiff lived. Rather, the claim is made against the defendant as a parent company which, knowing (so it is said) that exposure to asbestos was gravely injurious to health, failed to take proper steps to ensure that proper working practices were followed and proper safety precautions observed throughout the group. In this way, it is alleged, the defendant breached a duty of care which it owed to those working for its subsidiaries or living in the area of their operations (with the result that the plaintiffs thereby suffered personal injury and loss). Some 360 claims are made by personal representatives of deceased victims. As reformulated during the first Court of Appeal hearing the main issue raised by the plaintiffs' claim was put in this way:

“whether a parent company which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company?”

The first of the writs in these proceedings was issued by Mrs. Lubbe and four other plaintiffs on 14 February 1997 (and when she died the action was continued by Mr. Lubbe as her personal representative). The defendant promptly applied to stay the proceedings on the ground of forum non conveniens. This application came before Mr. Michel Kallipetis Q.C. sitting as a deputy judge of the Queen's Bench Division, who acceded to it. He sought to apply the principles authoritatively laid down by this House in

*Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460, and for reasons given in a lengthy and careful judgement dated 12 January 1998 he concluded that everything pointed towards South Africa as the natural forum for the trial of the action and that there was no pressing circumstance which would justify him in deciding that the interests of justice required a trial in this country instead of the natural forum in South Africa.

The plaintiffs appealed and on 30 July 1998 the Court of Appeal (Evans, Millett and Auld L. JJ.) allowed the appeal: [1998] C.L.O.C. 1559. Like the judge, the Court of Appeal also sought to apply the principles in *Spiliada*. But it reached a different conclusion, holding that the judge had failed to give weight to the fact that the negligence alleged was against the defendant company as opposed to those persons or companies responsible for running its South African businesses from time to time, and that the judge had failed to take account of the fact that the South African Forum had been unavailable to the plaintiffs until the defendant offered undertakings during the hearing before the judge, the availability of the South African forum being conditional upon those undertakings being fulfilled (at page 1573). Taking those matters into account, the Court of Appeal (“the first Court of Appeal”) held that the defendant did not show that South Africa was clearly and distinctly the more appropriate forum. In fairness to the judge it should be observed that the second of these points was not raised before him (it was indeed raised by the first Court of Appeal itself) and he could not therefore be reproached for failing to take it into account.

At that stage, therefore, the plaintiffs were at liberty to pursue their action in England. Before either of these decisions the sole plaintiff resident in England (Mrs. Nel) had also issued proceedings as personal representative of her husband, joining no other plaintiff. The defendant sought to challenge the decision of the first Court of Appeal but leave to do so was refused by that court and, following an oral hearing, by your Lordships’ House on 14 December 1998.

After the refusal of leave by your Lordships in December 1998, writs were issued by all the remaining plaintiffs in these proceedings. It is unnecessary to summarise the detailed procedural steps which followed. It is enough to note that the defendant applied to stay all the actions, including the Lubbe action, on grounds of forum non conveniens and abuse of process, and directions were given to consolidate the various proceedings (without prejudice to the position of the Lubbe plaintiffs) into a group action.

The defendant’s summons to stay came before Buckley J. who heard detailed submissions and considered copious documentary material. He gave a full judgement in writing on 30 July 1999: [2000] 1 Lloyd’s Rep. 139 at 141. He concluded that South Africa was clearly and distinctly the more appropriate forum for trial of this group action and

that there were no sufficient reasons for nevertheless refusing a stay (page 151). In reaching this last opinion he considered and discounted a number of objections raised by the plaintiffs, including the alleged unavailability of legal aid in South Africa. Of that submission he said (page 150)

“In all the circumstances, I cannot find that legal aid would not be granted, if applied for in South Africa. I readily accept there may be difficulties and some delay but that, at least in part, must flow from the claimants’ decision not to apply for legal aid in South African and to issue proceedings here, when, as [the plaintiffs’ solicitor] well knew, the defendant would contest jurisdiction.”

The judge accordingly ordered a stay of proceedings. He considered an argument advanced by the defendant that the proceedings were an abuse. The basis of this argument was that the solicitors representing the Lubbe plaintiffs had misled the first Court of Appeal and the House of Lords by failing to disclose their intention, if jurisdiction in England was established in the Lubbe case, to launch a multi-plaintiff group action, and also that the bringing of a group action was oppressive and an abuse. The judge expressed criticism of the solicitors representing the Lubbe plaintiffs but stopped short of finding abuse of the process (page 154). The judge also considered an argument, advanced by the defendant, suggesting that there were public interest grounds for concluding that the proceedings should be tried in South Africa: the judge reached his decision independently of this argument (page 154), but considered that it reinforced his decision. He gave both sides leave to appeal.

Thus the matter came before the Court of Appeal (Pill, Aldous and Tuckey L. JJ., “the second Court of Appeal”) again, and in judgements given on 29 November 1999 ([2000] 1 Lloyd’s Rep. 139) the appeals were dismissed. Pill L. J. described the factors pointing towards South Africa as the more appropriate forum as “overwhelming” (page 160). The action had the most real and substantial connection with South Africa and considerations of expense and convenience pointed strongly in the direction (page 161). The public interest considerations supported that conclusion (pages 161-2). He was not persuaded by the argument that South African High Court would be unable to handle these actions (page 162), and with reference to legal representation he said (at page 164):

“I have already referred to the high repute in which the South African courts are held. There is also in South Africa a legal profession with high standards and a tradition of public service, though I do not suggest aht lawyers in South Africa, any more than those anywhere else, can be expected to act on large scale without prospects of remuneration. While I would not be prepared to apply the second stage of the Siliada test, so as to permit English litigation, even in the absence of

evidence that legal representation will be available, I am unable to conclude that in the circumstances it would not become available for claims in South African courts. Moreover, given the accessibility to the wealth of scientific, technical and medical evidence available in this context, I am confident that it could be made available in a South African court, to the extent required to achieve a proper consideration of the plaintiffs' cases. The action would by no means be novel or speculative."

Pill L. J. was not prepared to strike out the proceedings as an abuse of process (page 164-5). He recorded that the plaintiffs had not pursued their contention that Article 2 of the Brussels Convention deprived the English court of any discretion to stay an action brought against a defendant domiciled here, since they did not wish the proceedings to be delayed while a reference was made to the European Court of Justice (pages 164-5). He considered that the bringing of the multi-plaintiff group action entitled the Court of Appeal; to reconsider the decision of the first Court of Appeal in the Lubbe action and to reach a different conclusion (page 165). He dismissed the appeal.

Aldous L.J. agreed, while recording earlier reservations about the availability of legal representation (page 166). He also expressed strong criticism of the solicitors representing the Lubbe plaintiffs but agreed with Pill L.J. that what had happened did not mean that there was an abuse of process such that the group action and the Lubbe action should be stayed (page 167). Tuckey L.J. also agreed: he deprecated the acrimony caused by the Lubbe solicitors' failure to inform the Court of Appeal and the House of Lords of the plan to launch a group action (page 168) and attached less weight than the first Court of Appeal had done to the fact that the South African forum had only become available because of the defendant's undertaking to submit (page 168). The second Court of Appeal refused leave to appeal, but leave was given by your Lordships to the plaintiffs on 7 February 2000. On 30 March 2000 our Lordships also vacated the earlier order refusing leave to appeal in the Lubbe action and gave leave to the defendant to challenge the decision of the first Court of Appeal.

Reference should be made, finally, to an action which is not directly involved in these proceedings. On 3 October 1997 proceedings were issued by Vincenzina Gisondi and three other plaintiffs against the defendant making claims on grounds similar to those relied on by the plaintiffs in the proceedings before the House. "The significant difference is that these plaintiffs complain of exposure to asbestos and asbestos products not in South African but in Italy. Thus the plaintiffs are resident in a state which is party to the Brussels Convention and sue a defendant domiciled in England, another contracting state. It has not been suggested that the English court could under the Convention decline jurisdiction in favour of an Italian forum, and no application for a stay has been made by the defendant in that case. There appears to be no jurisdictional objection to the prosecution of that action here, and no

application has been made to strike out the claim as disclosing no cause of action.

### THE APPLICABLE PRINCIPLES

Where a plaintiff sues a defendant as of right in the English court and the defendant applies to stay the proceedings on grounds of forum non conveniens, the principles to be applied by the English court in deciding that application in any case not governed by Article 2 of the Brussels Convention are not in doubt. They derive from the judgement of Lord Kinnear in *Sim v. Robinow* (1892) 19 R. 665 at 668 where he said:

"the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."

Thus it is the interest of all the parties, not those of the plaintiff only or the defendant only, and the ends of justice as judged by the court on all the facts of the case before it, which must control the decision of the court. In *Spiliada* it was stated (at page 476):

"The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."

In applying this principle the court's first task is to consider whether the defendant who seeks a stay is able to discharge the burden resting upon him not just to show that England is not the natural or appropriate forum for the trial but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is had to the fact that jurisdiction has been founded in England as of right (*Spiliada*, page 477). At this first stage of the inquiry the court will consider what factors there are which point in the direction of another forum (*Spiliada*, page 477; *Connelly v. R.T.Z. Corporation Plc.* [1998] A.C. 854 at 871). If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, that is likely to be the end of the matter. But if the court concludes at the stage that there is some other available forum which prima facie is more appropriate for the trial of the action it will ordinarily grant a stay unless the plaintiff can show that there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this second stage the court will concentrate its attention not only on factors connecting the proceedings with the foreign or the English forum (*Spiliada*, page 478; *Connelly*, page 872) but on whether the plaintiff will obtain justice in the foreign

jurisdiction. The plaintiff will not ordinarily discharge the burden lying upon him by showing that he will enjoy procedural advantages, or a higher scale of damages or more generous rules of limitation if he sues in England; generally speaking, the plaintiff must take a foreign forum as he finds it, even if it is in some respects less advantageous to him than the English forum (*Spiliada*, page 482; *Connelly*, page 872). It is only if the plaintiff can establish that substantial justice will not be done in the appropriate forum that a stay will be refused (*Spiliada*, page 482; *Connelly*, page 873).

This is not an easy condition for a plaintiff to satisfy, and it is not necessarily enough to show that legal aid is available in this country but not in the more appropriate foreign forum. Lord Goff of Chieveley said in *Connelly* (at page 873):

“I therefore start from the position that, at least as a general rule, the court will not refuse to grant a stay simply because the plaintiff has shown that no financial assistance, for example, in the form of legal aid, will be available to him in the appropriate forum, whereas such financial assistance will be available to him in England. Many smaller jurisdictions cannot afford a system of legal aid. Suppose that the plaintiff has been injured in a motor accident in such a country, and succeeds in establishing English jurisdiction on the defendant by service on him in this country where the plaintiff is eligible for legal aid, I cannot think that the absence of legal aid in the appropriate jurisdiction would in itself justify the refusal of a stay on the ground of forum non conveniens. In this connection it should not be forgotten that financial assistance for litigation is not necessarily regarded as essential, even in sophisticated legal systems. It was not widely available in this country until 1949; and even since that date it has been only available for persons with limited means. People above that limit may well lack the means to litigate, which provides one reason for the recent legalisation of conditional fee agreements.

Even so, the availability of financial assistance in this country, coupled with its non-availability in the appropriate forum, may exceptionally be a relevant factor in this context. The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available.

In *Connelly* a majority of the House held that the case before it was such an exceptional case. The nature and complexity of the case were such that it could not be tried at all without the benefit of legal representation and expert scientific assistance available in this country but not in the more appropriate forum, Namibia. That being so, the majority of the House concluded that the Namibian forum was not one in which the case could be tried more suitably for the interests of all the parties and for the ends of justice.

## THE PRESENT CASES

The issues in the present cases fall into two segments. The first segment concerns the responsibility of the defendant as a parent company of ensuring the observance of proper standards of health and safety by its overseas subsidiaries. Resolution of this issue will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent company, including minutes of meetings, reports by directors and employees on visits overseas and correspondence.

The second segment of the cases involves the personal injury issues relevant to each individual: diagnosis, prognosis, causation (including the contribution made to a plaintiff's condition by any sources of contamination for which the defendant was not responsible) and special damage. Investigation of these issues would necessarily involve the evidence and medical examination of each plaintiff and an inquiry into the conditions in which that plaintiff worked or lived and the period for which he did so. Where the claim is made on behalf of a deceased person the inquiry would be essentially the same, although probably more difficult.

In his review of the *Lubbe* case, which was alone before him, Mr. Kallipetis considered that the convenience of trying the personal injury issues in South Africa outweighed any benefit there might be in trying the parent company responsibility issue here. That was in my opinion a tenable though not an inevitable conclusion on the case as then presented. The two reasons given by the first Court of Appeal for disturbing that exercise of judgement are not to my mind convincing. Mr. Kallipetis' judgement does not suggest that he overlooked the way in which the plaintiffs put their case, although he did not express it very clearly (perhaps because the pleading was not very clear). The first Court of Appeal thought it undermined the defendant's application for a stay that the South African forum only became available as a result of the defendant's undertaking to submit, but for reasons given by my noble and learned friend Lord Hope of Craighead (with which I fully agree) this was not a factor which should have weighed in the balance either way. I would not accept the argument advanced by the plaintiffs on this point. I question whether the first Court of Appeal was justified in disturbing Mr. Kallipetis' conclusion and substituting its own. But its own assessment of the balance between the parent company responsibility issue and the personal injury issues is not shown to be unreasonable or wrong. On the case as then presented there was room for the view that South Africa was not shown to be a clearly more appropriate

forum. This is a field in which differing conclusions can be reached by different tribunals without either being susceptible to legal challenge. The jurisdiction to stay is liable to be perverted if parties litigate the issue at different levels of the judicial hierarchy in the hope of persuading a higher court to strike a different balance in the factors pointing for and against a foreign forum.

The emergence of over 3,000 new plaintiffs following the decision of the first Court of Appeal had an obvious and significant effect on the balance of the proceedings. While the parent company responsibility issue remained very much what it had always been, the personal injury issues assumed very much greater significance. To investigate, prepare and resolve these issues, in relation to each of the plaintiffs, would plainly involve a careful, detailed and cumbersome factual inquiry and, at least potentially, a very large body of expert evidence. In this changed situation Buckley J., applying the first stage of the *Spiliada* test, regarded South Africa as clearly the more appropriate forum for trial of the group action and the second Court of Appeal agreed. Both courts were in my view plainly correct. The enhanced significance of the personal injury issues tipped the balance very clearly in favour of South Africa at the first stage of the *Spiliada* exercise, and no effective criticism has been made of the conclusion. The brunt of the plaintiffs' argument on these appeals to the House has been directed not against the decisions of Buckley J. ; and the second Court of Appeal on the first stage of the *Spiliada* test but against their conclusion that the plaintiffs had not shown that substantial justice would not be done in the more appropriate South African forum.

## FUNDING

The plaintiffs submitted that legal aid in South African had been withdrawn for personal injury claims, that there was not reasonable likelihood of any lawyer or group of lawyers being able or willing to fund proceedings of this weight and complexity under the contingency fee arrangements permitted in South African since April 1999 and that there was no other available source of funding open to the plaintiffs. These were, they argued, proceedings which could not be effectively prosecuted without legal representation and adequate funding. To stay proceedings in England, where legal representation and adequate funding are available, in favour of the South African forum where they are not would accordingly deny the plaintiffs any realistic prospect of pursuing their claims to trial.

The defendant roundly challenged these assertions. Reliance was placed on the facts that the plaintiffs had not applied for legal aid in South Africa before its withdrawal and had made no determined effort to obtain funding in South Africa. Even if legal aid was no longer available in South Africa, contingency fee agreements were now permissible and it was unrealistic to suppose that South African counsel and attorneys would be any less ready to act than English counsel and solicitors if the claims were

judged to have a reasonable prospect of success. If contingency fee arrangements could not be made in South Africa because South African counsel and attorneys did not judge the claims to have a reasonable prospect of success, that did not involve a denial of Justice to the plaintiffs. In any event there were other potential sources of assistance available to the plaintiffs in South Africa.

The material placed before the House (and the lower courts) relevant to these issues is very extensive and cannot conveniently be summarised. The following conclusions are in my opinion to be drawn from it:

- 1) The proceedings as now constituted can only be handled efficiently, cost-effectively and expeditiously on a group basis. It is impossible at this stage to predict with accuracy what procedural directions might on that basis be given in future (although the directions could only relate to the conduct of proceedings in England). Obvious possibilities include the trial of a preliminary issue on the parent company responsibility question and the trial of selected lead cases to test the outcome in different factual situations. It would be very highly desirable, if possible, to avoid determination of these claims on a plaintiff by plaintiff basis.
- 2) The plaintiffs' claims raise a serious legal issue concerning the duty of the defendant as a parent company, and it would be necessary to decide whether that duty was governed by English or South African law. If a duty were held to exist, there would be a serious factual issue whether the defendant was in breach of it. If the plaintiffs were successful on these questions, the personal injury issues would have, even in the context of a group action, to be investigated, prepared and quantified. This would be a heavy and difficult task. It could only be done by, or under the supervision of professional lawyers. It would call for high quality expert advice and evidence, certainly on medical and industrial issues, very possibly on other issues also. I see no reason to question the judgement of a South African attorney instructed by the defendant who swore:

“The magnitude and complexity of both the factual and legal issues will require the application in South Africa of considerable financial resources and manpower, if there is to be any reasonable prospect of addressing the plaintiffs' allegations meaningfully.”

It is significant that Professor Unterhalter, an independent expert approached by the defendant, observed:

“Detailed expert evidence would be required on a number of aspects of the matter. Without agreement between the parties as to how the issues might be limited, I would venture no opinion as

to the length and magnitude of this litigation, save to say that it is likely to be drawn out and complex, and would almost certainly come before the Supreme Court of Appeal in due course.”

3) A possibility must exist that the proceedings may culminate in settlement. The plaintiffs confidently predict such an outcome if they succeed on the parent company responsibility issue. But the defendant has given no indication that the claims will not be fully contested. In the *Spiliada* case Staughton J. thought it right to decide the stay application on the assumption that there would be a trial, and it would seem to me wrong in principle to reject a submission that justice will not be done in a foreign forum on the basis of a speculative assumption that, if a stay is granted, proceedings in the foreign forum will culminate in a just settlement without the need for a trial.

3) In a letter dated 20 September 1999 to Leigh, Day and company representing some of the plaintiffs, the Legal Aid Board of South Africa wrote:

“It will however be of interest to you to note that on 13 September 1999 the Legal Aid Board resolved, because of the financial crisis faced by it, as per the attached letter to the Minister of Justice, to exclude from the operation of the legal aid scheme operated by the South African Legal Aid Board with effect from 1 November 1999 funding in respect of personal injury claims and all other claims sounding in the money.”

Other material before the House makes plain that before this decision the Legal Aid Board had experienced a period of extreme financial stringency. Despite suggestions to the contrary there is no convincing evidence to suggest that legal aid might be made available in South Africa to fund this potentially protracted and expensive litigation. Written submissions on behalf of the Republic of South Africa contain no hint that public funds might, exceptionally, be made available to fund it.

(5) The South African Contingency Fees Act (No. 66 of 1997) sanctioned a new regime similar (although not identical) to that governing conditional fees in this country. It enables counsel and attorneys to undertake work for plaintiffs on the basis that if the claim is successful they will receive a fee in excess of that ordinarily chargeable, and that they receive nothing if the claim fails. This regime does not apply to the fees of expert witnesses, who may not be engaged on the basis that they are paid only if the plaintiff by whom they are called is successful. The defendant referred to an affidavit sworn by very experienced South African counsel who deposed:

“In my view, if a firm of attorneys with a reasonable infra-structure is of the view that the claims of the present Plaintiffs are good, this would mean that the firm would be able to earn very substantial sums of money by way of fees. At the same time, one should not lose sight of the fact

that this case is likely to have a very high profile and that the Plaintiffs’ attorney’s would be accorded a great deal of positive publicity in the media. This would be a further inducement to take on a case of this nature. There is every reason to believe that there would be shortage of firms of attorneys who would be desirous of taking on such a case if they believed that it had good prospects of success. “Accordingly, if there are attorneys in South Africa who are as positive about the prospects of success as [the plaintiffs’ solicitor] is (as conveyed in his affidavit), I feel sure that there will be no lack of attorneys in South Africa prepared to represent these plaintiffs under Contingency Fee arrangements.”

This very general assertion of belief by a member of the Bar was flatly contradicted by a number of other equally distinguished counsel who provided sworn statements to the plaintiffs, and counsel for the defendant indicated that he placed no reliance on it. More significantly, it received no support from any practicing attorney, and it would be attorneys who would be required, if these proceedings were undertaken for the plaintiffs on a contingency fee basis, to finance the investigation of the claims, the obtaining and calling of evidence and the conduct of the trial during a period which would inevitably last for months and, very much more probably, years. The clear, strong and unchallenged view of the attorneys who provided statements to the plaintiffs was that no firm of South African attorneys with expertise in this field had the means or would undertake the risk of conducting these proceedings on a contingency fee basis. The defendant suggested that financial support and professional assistance might be given to the plaintiffs by the Legal Resources Centre, but this suggestion was authoritatively contradicted. In a recent affidavit the possibility was raised that assistance might be forthcoming from the European Union Foundation for Human Rights in South Africa but the evidence did not support the possibility of assistance on the scale necessary to fund this litigation.

6) If these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and the expert evidence which would be essential if these claims were to be justly decided. This would amount to a denial of justice. In the special and unusual circumstances of these proceedings, lack of the means, in South Africa, to prosecute these claims to a conclusion provides a compelling ground, at the second stage of the *Spiliada* test, for refusing to stay the proceedings here.

7) The conclusions on the funding issue reached by the second Court of Appeal did not in my opinion take account of the evidence, which did not permit the finding which the court made.

The plaintiffs as a ground for challenging the appropriateness of the South African forum, relied on the

absence of established procedures in South Africa for handling group actions such as the present. They compared that situation with the procedural situation here, where the conduct of group actions is governed by a recently-developed but now tried and established framework of rules, practice directions and subordinate legislation. I do not regard this objection, standing alone, as compelling. It involves the kind of procedural comparison which the English court should be careful to eschew (*Spiliada*, page 482; *Connelly*, page 872), and the evidence is clear that South African courts have inherent jurisdiction to adopt procedures appropriate to the cases they are called upon to handle. There is force in the observations of Pill L.J. ([2000] 1 Lloyd's Rep. 139 at 162):

“I am entirely unpersuaded by arguments that the South African High Court would be unable to handle these actions efficiently either on the ground that there are territorial divisions within South Africa or because there is at present no procedure expressly providing for group actions. It is common ground that the law potentially to be applied is the same throughout South Africa. “In England, there has been a vast amount of litigation by victims of asbestos dust without resort to group actions. Whether by a form of group action or otherwise, I have no doubt that the High Court of South Africa will be able to devise and adopt suitable procedures for the efficient dispatch of business such as this. None of the evidence or submissions on behalf of the plaintiffs suggests any significant obstacle to the efficient dispatch by the Court of cases before it.”

I do, however, think that the absence, as yet, of developed procedures for handling group actions in South Africa reinforces the submissions made by the plaintiffs on the funding issue. It is one thing to embark on and fund a heavy group action where the procedures governing the conduct of the proceedings are known to and understood by experienced judges and practitioners. It may be quite another where the exercise is novel and untried. There must then be an increased likelihood of interlocutory decisions which are contentious, with the likelihood of appeals and delay. It cannot be assumed that all judges will respond to this new procedural challenge in the same innovative spirit. The exercise of jurisdiction by the South African High Court through separate territorial divisions, while not a potent obstacle in itself, could contribute to delay, uncertainty and cost. The procedural novelty of these proceedings, if pursued in South Africa, must in my view act as a further disincentive to any person or body considering whether or not to finance the proceedings.

### THIRD PARTIES

Both before Buckley J. and the second Court of Appeal it was contended by the defendant and accepted as a factor pointing towards the appropriateness of the South African forum that the defendant, if sued there, could make and enforce claims against third parties who could be shown

to have contributed to the plaintiffs' condition, whereas it might be difficult to join such parties and enforce judgements if the actions were pursued here. The plaintiffs have sought to meet this point by questioning whether, in truth, the defendant has disclosed any potential claim against an identified third party with assets or insurance sufficient to meet any significant claim; by relying on Court of Appeal authority (*Holtby v Brigham & Cowan (Hull) Ltd.*, unreported, 6 April 2000) for the proposition that a defendant is only liable for such proportion of a plaintiffs' damage as he is shown to have caused; and by formally undertaking in asbestos (but not mesothelioma) cases, to limit their claim to compensation for loss and damage for asbestos-related disease to such sum as would reflect the proportion of a plaintiffs' total asbestos exposure as was shown to be the defendant's responsibility. The courts below were in my judgement right to treat the third party consideration as one strengthening the appropriateness of the South African forum, but I am persuaded by the plaintiffs' response that the refusal of a stay will not expose the defendant to a significant risk of prejudice so long as any new claimants are admitted to the group only upon their binding themselves by the undertaking of the present plaintiffs.

### ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The submitted that to stay these proceedings in favour of the South African forum would violate the plaintiffs' rights guaranteed by Article 6 of the European Convention since it would, because of the lack of funding and legal representation in South Africa, deny them a fair trial on terms of litigious equality with the defendant. For reasons already given, I have concluded that a stay would lead to a denial of justice to the plaintiffs. Since, as *Spiliada* makes clear, a stay will not be granted where it is established cogent evidence that the plaintiff will not obtain justice in the foreign forum, I cannot conceive that the court would grant a stay in any case where adequate funding and legal representation of the plaintiff were judged to be necessary to the doing of justice and these were clearly shown to be unavailable in the foreign forum although available here. I do not think Article 6 supports any conclusion which is not already reached on application of *Spiliada* principles. I cannot, however, accept the view of the second Court of Appeal that it would be right to decline jurisdiction in favour of South Africa even if legal representation were not available here.

### PUBLIC INTEREST

Both the plaintiffs and the defendant placed reliance on public interest considerations as strengthening their contentions that these proceedings should be tried in the forum for which they respectively contended. I agree with my noble and learned friend Lord Hope of Craighead, for the reasons which he gives, that public interest considerations not related to the private interests of the

parties and the ends of justice have no bearing on the decision which the court has to make. Where a catastrophe has occurred in a particular place, the facts that numerous victims live in that place, that the relevant evidence is to be found there and that site inspections are most conveniently and inexpensively carried out there will provide factors connecting any ensuing litigation with the court exercising jurisdiction in that place. These are matters of which the *Spiliada* test takes full account. It is important that the focus should remain on the principle so clearly stated by Lord Kinneir: in applying this principle questions of judicial amour propre and political interest or responsibility have no part to play.

## ARTICLE 2 OF THE BRUSSELS CONVENTION

The House received and heard erudite argument on the applicability of Article 2 of the Brussels Convention to a case such as the present. The plaintiffs submitted that the court was precluded by Article 2 from granting a stay. The defendant argued that the jurisdiction of the court to grant a stay in favour of a forum in a non-contracting state was unaffected by Article 2. The correctness of the Court of Appeal decision in *In re Harrods (Buenos Aires) Ltd.* [1992] Ch. 72 was in issue. Both parties argued that the answer for which they respectively contended was clearly correct. If it was not, the plaintiffs invited the House to seek a ruling from the European Court of Justice, a course which the defendant resisted.

For reasons already given, I am unwilling to stay the plaintiffs' proceedings in this country. It is accordingly unnecessary to decide whether the effect of Article 2 is to deprive the English court of jurisdiction to grant a stay in a case such as this. Had it been necessary to resolve that question, I would have thought it necessary to seek a ruling on the applicability of Article 2 from the European Court of Justice, since I do not consider the answer to that question to be clear.

## CONCLUSION

I would dismiss the defendant's appeal against the decision of the first Court of Appeal. I would allow the plaintiffs' appeal against the decision of the second Court of Appeal and remove the stay which that court upheld. The defendant must bear the costs of both appeals, and also the costs of the proceedings before Buckley J. and the second Court of Appeal.

## LORD STEYN

My Lords,

I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead. For the reasons they give I would also make the order which Lord Bingham of Cornhill proposes.

## LORD HOFFMANN

My Lords,

I have had the advantage of reading the draft of the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead. For the reasons they give, I would also make the order which Lord Bingham of Cornhill proposes.

## LORD HOPE OF CRAIGHEAD

My Lords,

I have had the advantage of reading the draft the speech of my noble and learned friend Lord Bingham of Cornhill. I agree with it, and for the reasons which he has given I too would allow the claimants' appeals and dismiss the appeal by the defendant. I should however like to add some observations on two matters that were raised in the course of the argument about the doctrine of forum non conveniens.

## AVAILABLE FORUM

It is clear that the decision of the first Court of Appeal [1998] C.O.L.C. 1559 to refuse a stay was much influenced by the view which they formed about the defendant's submission that the South African courts were available to the plaintiffs because it had offered during the hearing before the judge to submit to the jurisdiction of those courts.

It was not suggested to the judge that there were any reasons for doubting that this offer had removed the difficulty that the defendant was not otherwise subject to the jurisdiction of the South African courts as it was neither present nor had any assets in South Africa. But in the Court of Appeal it was contended that the offer was objectionable, for two reasons. The first was that the courts in South Africa were not available at the time when the plaintiffs brought their proceedings in England, as the defendant did not indicate its willingness to be sued in South Africa until after the proceedings had been brought. The second was that the effect of treating the South African courts as available in these circumstances was to give the defendant a choice of jurisdiction, enabling it to elect for the court that was more favourable to it and thus indulge in forum shopping. Evans L.J. did not go so far in his judgement as to say that the South African courts were not to be regarded as available in these circumstances. But he made it clear that in his opinion the fact that the South African courts were not available until the defendant offered the undertakings, and that their availability remained conditional upon them, were factors which should be taken into account in the application to the case of the principles stated in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] A.C. 460. The implication was that these were factors to be weighed in the balance against the



defendant in the decision whether or not the action should be stayed.

This is not a point that required to be considered in *Connelly v. R.T.Z. Corporation Plc.* [1998] A.C. 854, and I think that counsel of the defendant was in error when he submitted to the Court of Appeal in the present case that it could have been: [1998] C.L.C. 1559, 156F. In *Connelly's* case the two defendant companies, like the defendant in this case, were English companies which had their registered offices in England. But the basis upon which they were being sued in England was that they were responsible, either directly in fact or vicariously in law, for defects in the health and safety arrangements at the mine which was operated in Namibia by a subsidiary of the first defendant by whom the plaintiff was employed while he was working there: see the issues which were identified in the Court of Appeal by Waite L.J.: [1996] Q.B. 361, 364B-D. The subsidiary, against which the plaintiff had previously directed his claim at the suggestion of the first defendant, was present and available to be sued in Namibia. It was common ground that Namibia was a forum that was available to the plaintiff for his claim of damages. No doubt this was on the view that for all practical purposes no distinction was to be drawn between the first defendant, which as my noble and learned friend Lord Hoffmann observed at [1998] A.C. 854, 876G was a multinational company present almost everywhere, and its subsidiary in Namibia.

In the present case the asbestos mines and mills in South Africa which were operated by the defendant's subsidiaries are all closed, and its subsidiaries are no longer present or available to be sued in that country. The question whether the South African courts are available to the claimants is the entirely dependent upon the proposition that the defendant itself is subject to the jurisdiction of those courts. As the defendant has no presence in that country, and as it has no assets there which could be attached to found jurisdiction, the only ground on which its courts could exercise jurisdiction against it is that of prorogation. The validity of the defendant's undertakings is therefore critical to its argument that the South African courts are available to the claimants as a forum in which their actions should be tried.

The approach that is to be taken to this question has been examined in a number of Scottish cases to which it may be helpful to refer, as the underlying principles which Lord Goff of Chieveley described in the *Spiliada* case were derived from the Scottish authorities.

In *Clements v. Macaulay* (1866) 4 M. 583 an objection was taken to the jurisdiction of the Scottish courts in an action to enforce a contract entered into between two Americans on the plea of forum non competens. This was on the grounds that Texas where the agreement was entered into was the only proper forum for the dispute and that the Scottish court was an inconvenient and improper forum.

Lord Justice- Clerk Inglis, having concluded that the view that the courts of Texas would have jurisdiction was plainly untenable, said at p. 592:

“But then I am bound to inquire, if this is an inconvenient and incompetent forum, where is the proper forum? Apart from the suggestion of Texas, no other suggestion is made, and I know no case of a plea of this kind being sustained, where the defender did not satisfy the court that there was another court where the cause could be tried with advantage to the parties and to the ends of justice. The defender does seem to have thought himself under obligation to suggest what was the proper forum, but he has unfortunately suggested one which has no jurisdiction.”

At p. 594 Lord Cowan said:

“Your Lordship has conclusively shown that there is no jurisdiction in the courts of Texas, on the ground stated by the defender, to entertain this action. Where, then, is the forum on which the defence is founded? When the court has given effect to such a plea, it has always been because another forum, specially referred to by the defender as that in which he undertakes to plead, has been regarded as the more convenient and preferable for securing the ends of justice. Here the elements for disposing of this defence, pleaded on this, its essential ground, do not exist.”

In *Société du Gaz Paris v. Société Anonyme de Navigation “Les Armateurs Français”* 1925 S.C. 332, 347 Lord Justice-Clerk Alness said that the result of the cases was that it must be plain that “another forum is open to the parties”. His analysis of the law was approved by Lord Dunedin in your Lordships' House: 1926 S.C. (H.L.) 13, 18. There is no indication here or in any of the other Scottish cases that this matter ought to be approached on any other basis than that this is a requirement that must be satisfied in a practical manner when the question of forum non conveniens is being considered by the court.

In *Clements v. Macaulay* the defender did not offer an undertaking to submit to the jurisdiction of the Texas courts. But in *Tulloch v. Williams* (1846) 8 D. 657 two actions had been raised against the defender when he was on a visit to Scotland relating to his conduct while acting as the pursuer's commissioner and attorney in Jamaica. He lodged with his defences in each action a minute stating that he was ready and willing to answer in the courts of Jamaica to any writ or action that the pursuer might bring against him with reference to that subject matter. The Lord Ordinary said that he was not aware of any authority for taking the course desired by the defender, which was to decline to proceed with the case in the meantime leaving it to the pursuer to institute proceedings against the defender in the courts of Jamaica. In the absence of such authority he repelled the plea. But he invited the pursuer to consider the defender's offer as providing the most satisfactory and least expensive way of having justice

administered between them, saying that to go on with the litigation in Scotland could not fail to be productive of much delay and additional expense. In the Inner House the process was sisted for three months in the light of these observations to allow the pursuer an opportunity to bring an action in the proper court in Jamaica. Lord President Boyle explained at p. 659 that it was a question of convenience whether the case should go on in Jamaica or whether it should proceed in Scotland upon evidence of the law and custom of Jamaica.

It was not suggested in *Tulloch v. Williams* that the fact that the defender did not offer to submit to the jurisdiction of the courts of Jamaica until he lodged his defences presented any difficulty, either on the ground that the offer came too late or on the ground that he ought not to be allowed to choose the jurisdiction in which he was to be sued. His undertaking was seen as the obvious solution to the difficulty that, although the most expedient course is in the interests of both parties was for the case to be dealt with not in Scotland but in Jamaica, the defender was not otherwise subject to the jurisdiction of the Jamaican courts.

In *Sim v. Robinow* (1892) 19 R. 665 the defender was sued in Scotland on the ground that he had been resident there for more than forty days. He maintained that he was only a temporary visitor to Scotland, that he was domiciled in South Africa, that he intended to return to his business in that country and that the courts of that country were the proper forum for determining the matter in dispute as they related to transactions between the parties when they were both in South Africa. His plea that the Scottish courts should decline jurisdiction on the ground of forum non conveniens was repelled. Lord Kinnear, who delivered the leading judgement, said that he was not satisfied that it had been shown that there was another court in which the action ought to be tried as being more convenient for all the parties and more suitable for the ends of justice. In regard to the question whether the courts of South Africa were available, he noted that the defender had not offered the same undertaking as was offered in *Tulloch v. Williams*. All that he had said was that he intended to go to South Africa, as to which Lord Kinnear observed at p. 669:

“I do not think that the pursuer can be asked to wait till the defender carried out this intention, or that he ought to be sent to a court which may be unable to exercise any jurisdiction over the defender in consequence of his continued absence from South Africa.”

He descried *Tulloch v. Williams* at – 669 as a very exceptional case and indicated that it ought not to be followed. But this was not because he thought that it was wrong for the court to proceed on the defender’s undertaking to submit to the jurisdiction of the other court which he offered after the action had been raised. His criticism decision in *Tulloch’s* case was that the court ought not to have sisted the action for a short period to await

events, but that it ought to have determined the matter either one way or the other there and then. This was on the ground that, as he put it at p.669:

“... if this court is not a convenient forum for the trial of the cause, then the action ought to be dismissed, but, if this court is a convenient forum, then I can see no reason why the action should not go on in the ordinary way.”

Under Scots procedure a decree of dismissal is a decree which is used when it is intended to decide that the particular action should not be allowed to proceed against the defender, but when is intended to leave it open to the pursuer to bring another action; Maclaren, *Courts of Session Practice* (1916), p. 1093.

In the light of these authorities I would have regarded the undertakings which were offered by the defendant in this case as sufficient to satisfy the requirement that the alternative forum in South Africa was available because it had undertaken to submit to the jurisdiction of the courts of that country. Nothing turns on the time when the undertakings were given. It is sufficient that they were before the judge when he was considering the question of forum non conveniens. As for the suggestion that the defendant was choosing its jurisdiction and thus indulging in a kind of forum shopping, this overlooks the fact that the issue as to forum non conveniens is for the court itself to resolve. It is not a matter that is left to the choice of the defender. Furthermore the court resolves the issue by looking to the interests of all parties and the ends of justice. As Lord Justice-Clerk Alness said in *Société du Gaz de Paris v. Armateurs Français*, 1925 S.C. 332, 347, it does not do so from the point of view of the defender only. The only purpose of the undertaking is to satisfy the requirement that the other forum is available. The ground on which the jurisdiction of the courts in the other forum is available to be exercised is of no importance either one way or the other in the application to the case of the *Spiliada* principles.

## PUBLIC INTEREST

In my opinion the principles on which the doctrine of forum non conveniens rest leave no room for considerations of public interest or public policy which cannot be related to the private interests of any of the parties or the ends of justice in the case which is before the court.

In *Société du Gaz de Paris v. Armateurs Français*, 1925 S.C. 332, 361, where jurisdiction was established over the defender by an arrestment to found jurisdiction, Lord Anderson rejected the extreme argument that that case ought not to be litigated in Scotland at all as it was an action between two foreigners. He said:

“Anyone who succeeds in founding jurisdiction in this way seems to me to be entitled, as of right, to invoke the exercise of the jurisdiction so

founded, and the court can only refuse to exercise the jurisdiction invoked if a defence of *forum non conveniens* is established.”

In the House of Lords, 1926 S.C. (H.L.) 13, 21 Lord Summer was alluding to the same point when he said:

“Obviously the court cannot allege its own convenience, or the amount of its own business, or its distaste for trying actions which involve taking evidence in French, as a ground of refusal ... the court has to proceed until the defender objects, but, as against the pursuer’s right, the defender has an equal right to plead *forum non conveniens*.”

In *MacShannon v. Rockware Glass Ltd.* [1978] A.C. 795, 822D Lord Salmon said that he did not think that matters of general policy should play any part in deciding issues of this kind, and Lord Keith of Kinkel made an observation to the same effect at p. 833D.

The proper approach therefore is to start from the proposition that a claimant who is able to establish jurisdiction against the defendant as of right in this country is entitled to call upon the courts of this country to exercise that jurisdiction. So, if the plea of *forum non conveniens* cannot be sustained on the ground that the case may be tried more suitably in the other forum, in the words of Lord Kinnear in *Sim v. Robinow* (1892) 19 R. 665, 668, “for the interests of all the parties and for the ends of justice”, the jurisdiction must be exercised – however desirable it may be on grounds of public interest or public policy that the litigation should be conducted elsewhere and not in the English courts. On the other hand, if the interests of all parties and the ends of justice require that the action in this country should be stayed, a stay ought to

be granted however desirable it may be on grounds of public interest or public policy that the action should be tried here.

I would therefore decline to follow those judges in the United States who would decide issues as to where a case ought to be tried on broad grounds of public policy: see *Union Carbide Corporation Gas Plant Disaster at Bhopal* (2986) 634 F. Supp. 842 and *Piper Aircraft Company v. Reynbo* (1981) 454 U.S. 235. I respectfully agree with Deane J.’s observation in *Oceanic Sun Line Special Shipping Company Inc. v. Fay* [1988] 165 C.L.R. 197, 255 that the court is not equipped to conduct the kind of inquiry and assessment of the international as well as the domestic implications that would be needed if it were to follow that approach. However tempting it may be to give effect to concerns about the expense and inconvenience to the administration of justice of litigating actions such as these in this country on the one hand or in South Africa on the other, the argument must be resolved upon an examination of their effect upon the interests of the parties who are before the court and securing the ends of justice in their case. I would hold that considerations of policy which cannot be dealt with in this way should be left out of account in the application to the case of the *Spiliada* principles.

#### LORD HOBHOUSE OF WOODBOROUGH

My Lords,

For the reasons given by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead, I too agree with the order which Lord Bingham of Cornhill has proposed.

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**IN THE HIGH COURT OF JUSTICE, GHANA HELD IN ACCRA  
ON THE 30<sup>TH</sup> DAY OF JULY, 1996;  
BEFORE HIS LORDSHIP N.S. GBADEGBE, J.**

**SUIT NO. MISC. 811/96**

FELICIA ADJUI & 3 ORS.

...

PLAINTIFFS

VRS.

THE ATTORNEY-GENERAL & 9 ORS.

...

DEFENDANTS

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**RULING:**

On the 10<sup>th</sup> day of May, 1996, the Plaintiffs caused the writ of summons herein to issue claiming reliefs which in the main arise out of an alleged nuisance committed by the defendants in the construction of an open sewerage system at Tema (see in particular the endorsement to the writ of summons).

Following the service of the said writ on the 5<sup>th</sup> defendant the International Bank for Reconstruction and Development (otherwise known as the World Bank), it entered an appearance under protest and or conditionally under Order 12 R. 24 on the 22<sup>nd</sup> day of May, 1996. On the 5<sup>th</sup> day of June, 1996 the said defendant by a notice of motion prays this court for an order setting aside the service upon it of the writ of summons and statement of claim on the ground that this court does not have jurisdiction over the 5<sup>th</sup> defendant in respect of the subject matter of the claim herein.

The grounds on which the said application is based may be found in paragraphs 4, 5, 6, and 7 of the affidavit of the applicant in support which depositions are as follows:

- “4. The International Bank for Reconstruction and Development, the 5<sup>th</sup> Defendant/Applicant, is an international, inter-governmental organization and a specialized agency of the United Nations.
5. Ghana is a member of the International Bank for Reconstruction and Development, and is signatory to its Articles of Agreement. Additionally, Ghana has acceded to the United Nation’s Convention on the Privileges and Immunities of the Specialized Agencies with respect to the International Bank for Reconstruction and Development.
6. As a member of the Bank, Ghana has certain obligation to the Bank which have been incorporated into Ghanaian law. One of these is the obligation to recognize the immunity of the Bank from suit, except to the extent to which this immunity is waived.
7. Without prejudice to the right of the 5<sup>th</sup> defendant/applicant to contest the accuracy of the allegations of fact pleaded by the plaintiffs, I am authorized to state that the 5<sup>th</sup> defendant/applicant contends that under Ghanaian law no action can be pursued against it by reason of the facts alleged by the plaintiffs”.

I think that the above accurately state the nature of legal argument advanced by the applicants’ counsel before me .....(not legible) the Diplomatic Immunities Act or 1962 the purport of which is to make the provisions of law commonly known as the Vienna Convention incorporated into the laws of Ghana and in particular

Section 1 of the said Ghanaian Legislation provides:

“1. Articles 22, 23, 24, and 27 to 40 of the Vienna Convention (which regulate the immunities and privileges including exemption from taxation, freedom of communication, inviolability of premises and immunity from civil and criminal jurisdiction, to be conferred upon diplomatic agents, shall have the force of law and references therein to the receiving state, shall, for this purpose be construed as references to the Republic”.

In answer to the application, the plaintiffs filed an affidavit in which the following depositions were made:

- “2. That the matters of nuisance complained of in this action affect private citizens.
3. That the International Bank for Reconstruction and Development (hereinafter called the Bank) cannot claim immunity from the jurisdiction of this court against private citizens.
4. That I am advised by counsel and verily believe the same to be true that the onus on the Bank to establish beyond doubt that it enjoys legal immunity in such proceedings in a commercial sphere of activities adversely affecting citizens of this country”.

Again, I think that the above depositions quite amply state the legal arguments which were announced before me.

I must say that in the course of arguments, there was no credible dispute that the 5<sup>th</sup> defendant is an International, Intergovernmental Organization and a specialized agency of the United Nations. Again there is no question on the fact that Ghana is a signatory to the Vienna Convention, the particular terms of agreements which have been exhibited on the affidavit of the applicant as “EHB 3” entitled International Bank for Reconstruction and Development, Articles of Agreement”.

The particular article of the convention which is in issue in this application is Article 7 Section 3 which provides:

“Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office has appointed an agent for the purpose of accepting service or notice of process, or has issued a guaranteed securities. No actions shall, however be brought by members or persons acting for a deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank”.

Whilst the applicant contends that the jurisdictional immunity which it is entitled to applied in the instant case, the plaintiffs assert to the contrary on the ground that the

wrong in question is one affecting private citizens and that to accede to the applicant's contention would have the effect of enabling persons in the position of the 5<sup>th</sup> defendant to trample on the rights of private persons and leave them remediless, an act which no court should endorse.

I must say at once that this area of the law is one in which source looks and materials are quite difficult to come by and that for the effort of counsel for the applicant in making available to this court, some decisions of the courts in the United States of America, I would have been left with no guide although it is quite clear that since the signing of the said convention issues of the nature which are now before me might have been considered if not in Ghana, in other countries which are signatories to the convention which decisions though not binding on this court may be of persuasive effect in at least offering this court the opportunity to know how other countries generally construe the provisions of Article 7(3) of the said convention. That this could be of assistance may be seen I the fact that the attitude of the signatories to the meaning of this provision should be in one direction in order to ensure certainty and conformity which is vital I the day to day working relationship of international bodies.

In the case of *Sussana Mendaro v. The World Bank* (International Bank for Reconstruction and Development) in an action in which an employee of the defendant bank sought damages based on discrimination resulting in her dismissal from employment, the United States Court of Appeal, District of Columbia in a judgment based mainly on the said Article 7(3) observed in 717 Federal Reporter Series @ 614 as follows:-

“Mendaro argues that Article VII Section 3 constitutes a broad waiver of immunity from all suits commenced in a court of competent jurisdiction located in specified territories subject to two clearly expressed exceptions. The Bank is absolutely immune from (1) suits by members of the Bank and (2) actions seeking prejudgment attachment of the bank's assets”.

Further at the said page, the court continued “However, we are unable to read the somewhat clumsy and inartfully drafted language of Article VII Section 3 – which the Hatcher Court admitted was “hardly a model of clarity” – as evidencing an intent of the members of the Bank to establish a blanket waiver of immunity from every type of suit not expressly prohibited by reservation in Article VII Section 3. The interpretation urged by Mendaro is logical, only if the waiver provisions are read in a vacuum, without reference to the interrelationship between the functions of the bank set forth in the Articles of Agreement and the underlying purposes of International Communities. When the language of Article VII Section 3 is approached from this view point it is evident that the World Bank's members

could only have intended to waive the Bank's immunity from suits by its debtors, creditors, bondholders and those other potential plaintiffs to whom the Bank would have to subject itself to suit in order to achieve its chartered objectives. Since a waiver of immunity from employee suits arising out of internal administrative grievance is not necessary for the bank to perform its functions, and could severely hamper its worldwide operations, this immunity is preserved by member's failure expressly to waive it...”

The above decision though not binding on me commends itself to me and as such I think the test which one has to apply in the application before me is whether the action herein arises from an area of activity “necessary for the Bank to perform its functions” and I answer unhesitatingly, “No”. In fact, if one should, hold otherwise, it would expose the Bank to numerous actions arising only out of the fact that the bank has made some aid available to a member state or a signatory to the Vienna Convention. One should only look at the impact of the Bank in the economy of many nations today and see how likely the Bank if its immunity is not preserved would have to be put to trouble defending multiple actions which no doubt would stifle its operations. I think that it was with this intentment that the provisions on jurisdictional immunity were made and I can see no reason which compels me to say this provisions should not apply to the intent action only because the alleged cause of action which is in nuisance affects private persons. In any event, since the action here is against several defendants, I do not think that the plaintiff is likely to be without a redress if the same is proven. I must observe, however that the fact that there are other defendants who may assume her claim is not the basis of this ruling; this ruling is based on the reading of Article 7(3) and what I consider to be its true interpretation, and it is irrelevant whether the action concerns private citizens or not see *Armon v. Katz* 1976) 2 GLR, 115.

Again, an examination of the said Article 7(3) reveals that a plaintiff who proceeds against the Bank must of necessity show that “Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued on guaranteed securities” within the jurisdiction in which the action is brought. Before me, however, no attempt was made to satisfy any of the above which in my view are conditions which evince a waiver by the Bank of its immunity. Since none of these conditions, the existence of which must be proved by the plaintiff is even mentioned, I am of the firm view that the jurisdictional immunity of the Bank from suit has not been waived and that the 5<sup>th</sup> defendant, is immune from the instant action. Accordingly, I directly that the service of the writ of summons herein on it is one without jurisdiction and consequently I discharge the said service on the grounds that this court has no jurisdiction in the action herein by virtue of Act 148 of 1962 for which reason I direct that the 5<sup>th</sup> Defendant be struck out as a party.

(Sgd.) N.S. Ghadegbe  
JUSTICE OF THE HIGH COURT  
(Illegible)

- (1) Mr. Joe Reindorf for the 5<sup>th</sup> Defendant/Applicant  
With him Mr. Tui Taikata.
- (2) Mr. C.B.N. Zwennes and with him Mrs. Zwennes.

asd





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## ***II***

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# ***Police Power and Compulsory Acquisition in Environmental Management***

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**U.S. SUPREME COURT**

**UNITED STATES v. RIVERSIDE BAYVIEW HOMES, INCL., 474 U.S. 121 (1985)**

**474 U.S. 121**

**UNITED STATES v. RIVERSIDE BAYVIEW HOMES, INC., ET AL. CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**No. 84-701**

**Argued October 16, 1985  
Decided December 4, 1985**

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The Clean Water Act prohibits any discharge of dredged or fill materials into “navigable waters” - defined as the “waters of the United States” – unless authorized by a permit issued by the Army Corps of Engineers (corps). Construing the Act to cover all “freshwater wetlands” that are adjacent to other covered waters, the Corps issued a regulation defining such wetlands as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.” After respondent Riverside Bayview Homes, Inc. (hereafter respondent), began placing fill materials on its property near the shore of Lake St. Clair, Michigan, the Corps filed suit in Federal District Court to enjoin respondent from filling its property without the Corps’ permission. Finding that respondent’s property was characterized by the presence of vegetation requiring saturated soil conditions for growth, that the source of such soil conditions was ground water, and that the wetland on the property was adjacent to a body of navigable water, the District Court held that the property was wetland subject to the Corps’ permit authority. The Court of Appeals reversed, construing the corps’ regulation to exclude from the category of adjacent wetlands – and hence from that of “waters of the United States” – wetlands that are not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation. The court took the view that the Corps’ authority under the Act and its implementing regulations must be narrowly construed to avoid a taking without just compensation in violation of the fifth Amendment. Under this construction, it was held that respondent’s property was not within the Corps’ jurisdiction, because its estuarine characteristics were not the result of frequent flooding by the nearby navigable waters, and that therefore respondent was free to fill the property without obtaining a permit.

Held:

1. The Court of Appeals erred in concluding that a narrow reading of the Corps’ regulatory jurisdiction over wetlands was necessary to avoid a taking problem. Neither the imposition of the permit requirement [474 U.S. 121, 122] itself nor the denial of a permit necessarily constitutes a taking. And the Tucker Act is available to provide compensation for takings that may result from the Corps’ exercise of jurisdiction over wetlands. Pp. 126-129
2. The District Court’s findings are not clearly erroneous and plainly bring respondent’s property within the category of wetlands and thus of the “waters of the United States” as defined by the regulation in question. Pp. 129-131.
3. The language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of material into wetlands adjacent to other “waters of the United States”. Pp. 131-139.

729 F.2d 391, reversed.

WHITE, J., delivered the opinion for a unanimous Court. Kathryn A. Oberly argued the cause for the United States. With her on the briefs were former Solicitor General Lee, Acting Solicitor General Fried, Assistant Attorney General Habicht, Deputy Solicitor General Claiborne, and Anne S. Almy

Edgar B. Washburn argued the cause for respondents. With him on the brief was Richard K. Gienapp.\*

[Footnote\*] Briefs of amici curiae urging reversal were filed for the National Wildlife Federation et al. By Jerry Jackson, Frank J. Kelley, Attorney General of Michigan, and Louis Caruso, Solicitor General; and for the State of California et al. By John K. Van de Kamp, Attorney General of California, N. Gregory Taylor and Theodora Berger, Assistant Attorneys General, and Steven H. Kaufmann and David W. Hamilton, Deputy Attorneys General, Joseph I. Lieberman, Attorney General of Connecticut, Michael A. Lilly, Attorney General of Hawaii, Neil F. Hartigan, Attorney General of Illinois and Jill Wine-Banks, Solicitor General, William J. Guste, Jr., Attorney General of Louisiana, Stephen H. Sachs, Attorney General of Maryland, Hubert H. Humphrey III, Attorney General of Minnesota, William L. Webster, Attorney General of Missouri, Mike Greely, Attorney General of Montana, Robert M. Spire, Attorney General of Nebraska, Paul Bardacke, Attorney General of New Mexico, Lacy H. Thornburg, Attorney General of North Carolina, Arlene Violet, Attorney General of Rhode Island, W.J. Michael Cody, Attorney General of Tennessee, Jeffrey L. Amestoy, Attorney General of Vermont, Charlie Brown, Attorney General of West Virginia and Bronson C. La Follete, Attorney General of Wisconsin.

Briefs of amici curiae urging affirmance were filed for the American Petroleum Institute by Stark Ritchie and James K. Jackson; for the Citizens of Chincoteague for a Reasonable Wetlands Policy by Richard R. Nageotte; for the Mid-Atlantic Developers Association by Kenneth D. McPherson; and for the Pacific Legal Foundation et al. By Ronald A. Zumbum and Sam Kazman.

R. Sarah Compton and Robin S. Conrad filed a brief for the Chamber of Commerce of the United States as amicus curiae.. [121, 123]

## JUSTICE WHITE delivered the opinion of the Court

This case presents the question whether the Clean Water Act (CWA) 33 U.S.C. 1251 et seq., together with certain regulations promulgated under its authority by the Army Corps of Engineers, authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries.

### I

The relevant provisions of the Clean Water Act originated in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, and have remained essentially unchanged since that time. Under 301 and 502 of the Act, 33 U.S.C. 1311 and 1362, any discharge of dredged or fill materials into “navigable waters” – defined as the “waters of the United States” – is forbidden unless authorized by a permit issued by the Corps of Engineers pursuant to 404, 33 U.S.C. 1344 1. After initially construing the Act to cover only waters navigable in fact, in 1975 the Corps issued interim final regulation redefining “the waters of the United States” to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and non-navigable intrastate waters whose use of misuse could affect interstate commerce. 40. Fed Reg. 31320 [474 U.S. 121, 124] (1975). More importantly for present purposes, the Corps construed the Act to cover all “freshwater wetlands” that were adjacent to other covered waters. A “freshwater wetland” was defined as an area that is “periodically inundated” and is “normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.” 33 CFR 209.120(d)(2)(h) (1976). In 1977, the Corps refined its definition of wetlands by eliminating the reference to periodic inundation and making other minor changes. The 1977 definition reads as follows:

“The term ‘wetlands’ those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas”> 33 CFR 323.2© (1978.,

In 1982, the 1977 regulations were replaced by substantively identical regulations that remain in force today. See 33 CFR 323.2 (1985. 2

Respondent Riverside Bayview Homes, Inc. (hereafter respondent), owns 80 acres of low-lying marshy land near the shores of Lake St. Clair in Macomb County, Michigan. In 1976, respondent began to place fill materials on its property as part of its preparations for construction of a housing development. The Corps of Engineers, believing that the property was an “adjacent wetland” under the 1975 regulation defining “waters of the United States,” filed suit

in the United States District Court for the Eastern District of Michigan, seeking to enjoin respondent from filling the property without the permission of the Corps [474 U.S. 121, 125].

The District Court held that the portion of respondent’s property lying below 575.5 feet above sea level was a covered wetland and enjoined respondent from filling it without a permit. Civ. No. 77-70041 (Feb. 24, 1977) (App. To Pet for Cert. 22a); Civ. No. 77-70041 (June 21 1979) App. To Pet. For Cert. 32a). Respondent appeal, and the Court of Appeals remanded for consideration of the effect of the intervening 1977 amendments to the regulation. 615 F.2d 1363 (1980). On remand, the District Court again held the property to be a wetland subject to the Corps’ permit authority. Civ. No. 77-70041 (may 10, 1981) App. To Pet. for Cert.42a).

Respondent again appealed, and the Sixth Circuit reversed. 729 F.2d 391 (1984). The Court construed the Corp’s regulation to exclude from the category of adjacent wetlands – and hence from that of “waters of the United States” – wetlands that were not subject to flooding by adjacent navigable waters at a frequency sufficient to support the growth of aquatic vegetation. The court adopted this construction of the regulation because, in its view, a broader definition of wetlands might result in the taking of privilege property without just compensation. The court also expressed its doubt that Congress, in granting the Corps jurisdiction to regulate the filling of “navigable waters,” intended to allow regulation of wetlands that were not the result of flooding by navigable waters. 3 Under the courts reading of the regulation, respondent’s property was not within the Corps’ jurisdiction, because its semiaquatic characteristics were not the result of frequent flooding by the nearly navigable waters. Respondent was therefore free to fill the property without obtaining a permit. [474 U.S. 121, 126].

We granted certiorari to consider the proper interpretation of the Corps’ regulation defining “waters of the United States” and the scope of the Corps’ jurisdiction under the Clean Water Act, both of which were called into question by the Sixth Circuit’s ruling. 469 U.S. 1206 (1985. We now reverse.

### II

The question whether the Corps of Engineers may demand that respondent obtain a permit before placing fill material on its property is primarily one of regulatory and statutory interpretation: we must determine whether respondent’s property is an “adjacent wetland” within the meaning of the applicable regulation, and, if so, whether the Corps’ jurisdiction over “navigable waters” gives it statutory authority to regulate discharges of fill material into such a wetland. In the connection, we first consider the Court of Appeals’ position that the Corps’ regulatory authority under the statute and its implementing regulations must be

narrowly construed to avoid a taking without just compensation in violation of the Fifth Amendment.

We have frequently suggested that governmental land-use regulation may under extreme circumstances amount to a “talking” of the affected property. See, e.g. *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). We have never precisely defined those circumstance, see *id.*, at 23-128 but our general approach was summed up in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980, where we stated that the application of landuse regulations to a particular piece of property is a taking only “if the ordinance does not substantially advance legitimate state interests... or denies an owner economically viable use of his land.” Moreover, we have made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. See *Hodel v. Virginia Surface Mining & Reclamation Assn.*, [474 U.S. 121 127] 452 U.S. 264, 293-297 (1981). The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does snot itself “take” the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent “economically viable” use of the land in question can it be said that a taking has occurred.

If neither the imposition of the permit requirement itself nor the denial of a permit necessarily constitutes a taking, it follows that the Court of Appeals erred in concluding that a narrow reading of the Corps’ regulatory jurisdiction over wetlands was “necessary” to avoid “a serious taking problem.” 729 F.2d, at 398. 4. We have held that, in general, “[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by awl, [474 U.S. 121, 128] when a suit for compensation can be brought against the sovereign subsequent to a taking.” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (footnote omitted). This maxim rests on the principle that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional. *Williamson County*, *supra*, at 194-195. For precisely the same reason, the possibility that the application of a regulatory programme may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the programme if compensation will in any event be available in those cases where a taking has occurred. Under such circumstance, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty, cf. *Ashwander v. TVA*, 297 U.S. 288-341 – 356 (1936) (Brandeis, J., concurring); it merely frustrates permissible applications of a statute or regulation. 5. Because the Tucker Act, 28

U.S.C. 1491, which presumptively supplies a means of obtaining compensation for any taking that may occur through the operation of a federal statute, see *Ruckelshaus v. Monsanto Co.*, *supra*, at 1017, is available to provide compensation for takings that may result from the Corps’ exercise of jurisdiction over wetlands, the Court of Appeals’ fears that application of the Corps’ permit programme might result in a taking did not justify the court in adopting a [474 U.S. 121, 129] more limited view of the Corps’ authority than the terms of the relevant regulation might otherwise support. 6

### III

Purged of its spurious constitutional overtones, the question whether the regulation at issue requires respondent to obtain a permit before filling its property is an easy one. The regulation extend s the Corps’ authority under 404 to all wetlands adjacent to navigable or interstate waters and their tributaries. Wetlands, in turn, are defined as lands that are “inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adopted for life in saturated soil conditions.” 33 CFR 323.2© (1985 (emphasis added). The plain language of the regulation refutes the Court of Appeals’ conclusion that inundation or “frequent flooding” by the adjacent body of water is a sine quo non of a wetland under the regulation. Indeed, the regulation could hardly state ore clearly that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that [474 U.S. 121, 130] the saturation is sufficient to and does support wetland vegetation.

The history of the regulation underscores the absence of any requirement of inundation. The interim final regulation that the current regulation replaced explicitly included a requirement of “periodi[c] inundation.” 33 CFR 209.120(d)(2)(h) (1976). In deleting the reference to “periodic inundation” from the regulation as finally promulgated, the Corps explained that it was repudiating the interpretation of that language “as requiring inundation over a record period of years.” 42 Fed. Reg. 37128 (1997). In fashioning its own requirement of “frequent flooding” the Court of Appeals improperly reintroduced into the regulation precisely what the Corps had excised. 7

Without the non-existent requirement of frequent flooding, the regulatory definition of adjacent wetlands covers the property here. The District Court found that respondent’s property was “characterized by the presence of vegetation that requires saturated soil conditions for growth and reproduction,” [474 U.S. 121, 131] App. To Pet. for Cert. 24a , and that the source of the saturated soil conditions on the property was ground water. There is no plausible suggesting that these findings are clearly erroneous, and they plainly bring the property within the category of wetlands as defined by the current regulation. In addition, the court found that the wetland located on respondent’s

property was adjacent to a body of navigable water, since the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to Black Creek, a navigable waterway. Again, the court's finding is not clearly erroneous. Together, these findings establish that respondent's property is a wetland adjacent to navigable waterway. Hence, it is part of the "waters of the United States" as defined by 33 CFR 323.2 (1985), and if the regulation itself is valid as a construction of the term "waters of the United States" as used in the Clean Water Act, a question which we now address, the property falls within the scope of the Corps' jurisdiction over "navigable waters" under 404 of the Act.

#### IV

##### A

An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. *Chemical Manufacturers Assn. v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985); *Chevron U.S. Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-845 (1984). Accordingly, our review is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features ore conventionally identifiable as "waters." § [474 U.S. 121, 132]

On a purely linguistic level, it may appear unreasonable to classify "lands", wet or otherwise, as "waters." Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat. In determining the limits of its power to regulate discharges under the Act, the corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs – in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority. Neither of these sources provides unambiguous guidance for the Corps in this case, but together they do support the reasonableness of the Corps' approach of defining adjacent wetlands as "waters"

within the meaning of 404(a). Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt "to restore and maintain the Chomical, physical, and biological integrity of the Nation's waters." CWA 101, 33 U.S.C. 1251. This objective incorporated a broad, systematic view of the goal of maintaining and improving water quality; as the House Report on the legislation put it, "the word 'integrity' ...refers to a condition in which the natural structure and function of ecosystem [are] maintained" H.R. Rep. No. 92-911, p. 76 (1972). Protection of aquatic ecosystems, Congress recognized, [474 U.S. 121, 133] demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, p. 77 (1972).

In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," see CWA 301(a), 404(a), 502(12), 33 U.S.C. 1311(a), 1344(a) 1362(12), the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation y earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term. See S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).

Of course, it is one thing to recognize that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of "waters" and include in that term "wetlands" as well. Nonetheless, the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term "waters" to encompass wetlands adjacent to waters as more conventionally defined. Following the lead of the Environmental Protection Agency, see 38 Fed. Reg. 10834 (1973), the Corps has determined that wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality:

"The regulation of activities that cause water pollution cannot rely on... artificial lines... but must focus on all waters that together form the entire aquatic system, [474 U.S. 121, 134]. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system"

“For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.” 42 Fed. Reg. 37128 (1977).

We cannot say that the Corps’ conclusion that adjacent wetlands are inseparably bound up with the “waters” of the United States – based as it is on the Corps’ and EPA’s technical expertise – is unreasonable. In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps’ ecological judgement about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgement that adjacent wetlands may be defined as waters under the Act.

This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water. The Corps has concluded that wetlands may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands. For example, wetlands that are not flooded by adjacent waters may still tend to drain into those waters. In such circumstances, the Corps has concluded that wetland may serve to filter and purify water draining into adjacent bodies of water, see 33 CFR 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see 320.4(b)(2)(iv) and (v). In addition, adjacent wetlands may “serve significant natural biological functions, including food chain production, general habitat, and nesting, [474 U.S. 121, 135] spawning, rearing and resting sites for aquatic ...species.” 320.4(b)(2)(I). In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water. Again, we cannot say that the Corps’ judgement on these matters is unreasonable, and we therefore conclude that a definition of “waters of the United States” encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act. Because respondent’s property is part of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case. <sup>9</sup>

## B

Following promulgation of the Corps’ interim final regulation in 1975, the Corps’ assertion of authority under 404 over waters not actually navigable engendered some congressional opposition. “The controversy came to a head during Congress’ consideration of the Clean Water Act of 1977, a major piece of legislation aimed at achieving “interim improvements within the existing framework” of

the Clean Water Act. H.R. Rep. No. 95-139, pp. 1-2 (1977). In the [474 U.S. 121, 136] end, however, as well shall explain, Congress acquiesced in the administrative construction.

Critics of the Corps’ permit programme attempted to insert limitations on the Corps’ 404 jurisdiction into the 1977 legislation: the House bill as reported out of committee proposed a redefinition of “navigable waters” that would have limited the Corps’ authority under 404 to waters navigable in fact and their adjacent wetlands (defined as wetlands periodically inundated by contiguous navigable waters). H.R. 3199, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess., 16 (1977). The bill reported by the Senate Committee on Environment and Public Works, by contrast, contained no redefinition of the scope of the “navigable waters” covered by 404, and dealt with the perceived problems of over regulation by the Corps by exempting certain activities (primarily agricultural) from the permit requirement and by providing for assumption of some of the Corps’ regulatory duties by federally approved state programme. S. 1952, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess., 49(b) (1977). On the floor of the Senate, however, an amendment was proposed limiting the scope of “navigable waters” along the lines set forth in the House bill. 123 Cong. Rec. 26710-26711 (1977).

In both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation. See *id.*, at 10426-10432 (House debate); *id.*, at 26710-26729 (Senate debate). Proponents of a more limited 404 jurisdiction contended that the Corps’ assertion of jurisdiction over wetlands and other nonnavigable “waters” had far exceeded what Congress had intended in enacting 404. Opponents of the proposed changes argue that a narrower definition of “navigable waters” for purposes of 404 would exclude vast stretches of crucial wetlands from the Corps’ jurisdiction, with detrimental effects on wetlands ecosystems, water quality, and the aquatic environment generally. The debate, particularly in the Senate, was lengthy. In the House, the debate ended with the adoption of a narrowed definition of “waters”; but in the Senate the limiting [474 U.S. 121, 137] amendment was defeated and the old definition retained. The Conference Committee adopted the Senate’s approach: efforts to narrow the definition of “waters” were abandoned; the legislation as ultimately passed, in the words of Senator Baker, “Retain[ed] the comprehensive jurisdiction over the Nation’s waters exercised in the 1972 Federal Water Pollution Control Act.” <sup>10</sup>

The significance of Congress’ treatment of the Corps’ 404 jurisdiction in its consideration of the Clean Water Act of 1977 is twofold. First, the scope of the Corps’ asserted jurisdiction over wetlands was specifically brought to Congress’ attention, and Congress rejected measures designed to curb the Corps’ jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of “navigable waters.” Although we are chary of attributing significance

to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it. See *Bob Jones University v. United States*, 461 U.S. 574, 599-601 (1983); *United States v. Rutherford*, 442 U.S. 544, 554 and n. 10 (1979).

Second, it is notable that even those who would have restricted the reach of the Corps' jurisdiction would have done so not by removing wetlands altogether from the definition of "waters of the United States," but only by restricting the scope of "navigable waters" under 404 to waters navigable in fact and their adjacent wetlands. In amending the definition of "navigable waters" for purposes of 404 only, the backers of the House bill would have left intact the existing definition of "navigable waters" for purposes of 301 of the [474 U.S. 121, 138] Act, which generally prohibits discharges of pollutants into navigable waters. As the House Report explained: "Navigable waters" as used in section 301 includes all of the waters of the United States including their adjacent wetlands." H.R. Rep. No. 95-139, p.24 (1977). Thus even those who thought that the Corps existing authority under 404 was too broad recognized: (1) that the definition of "navigable waters" then in force for both 301 and 404 was reasonable interpreted to include adjacent wetlands, (2) that the water quality concerns of the Clean Water Act demanded regulation of at least some discharges into wetlands, and (3) that whatever jurisdiction the Corps would retain over discharges of fill material after passage of the 1977 legislation should extend to discharges into wetlands adjacent to any waters over which the Corps retained jurisdiction. These views provide additional support for a conclusion that Congress in 1977 acquiesced in the Corps' definition of waters as including adjacent wetlands.

Two features actually included in the legislation that Congress enacted in 1977 also support the view that the Act authorizes the Corps to regulate discharges into wetlands. First, in amending 404 to allow federally approved state permit programmes to supplant regulation by the Corps of certain discharge of fill material, Congress provided that the States would not be permitted to supersede the Corps' jurisdiction to regulate discharges into actually navigable waters and waters subject to the ebb and flow of the tide, "including wetlands adjacent thereto." CWA 404(g)(1), 33 U.S.C. 1344(g) (1). Here, then, Congress expressly stated that the term "waters" included adjacent wetlands. <sup>11</sup> Second, the [474 U.S. 121, 139] 1977 Act authorized an appropriation of \$6 million for completion by the Department of Interior of a "National Wetlands Inventory" to assist the States "in the development and operation of programmes under this Act." CWA 208(I)(2), 33 U.S.C. 1288(I)(2). The enactment of this provision reflects congressional recognition that wetlands are a concern of the Clean Water Act and supports

the conclusion that in defining the waters covered by the Act to include wetlands, the Corps is "implementing congressional policy rather than embarking on a frolic of its own." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 375 (1969)

## C

We are thus persuaded that the language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the "waters of the United States." The regulation in which the Corps has embodied this interpretation by its terms includes the wetlands on respondent's property within the class of waters that may not be filled without a permit; and, as we have seen, there is no reason to interpret the regulation more narrowly than its terms would indicate. Accordingly, the judgement of the Court of Appeals is reversed.

## FOOTNOTES

[Footnote 1] With respect to certain waters, the Corps' authority may be transferred to States that have devised federally approved permit programmes. CWA 404(g), as added, 91 Stat. 1600, 33 U.S.C. 1344(g). Absent such an approved programme, the corps retains jurisdiction under 404 over all "waters of the United States."

[Footnote 2] The regulation also cover certain wetlands not necessarily adjacent to other waters. See 33 CFR 323.2(a)(2) and (3) (1985). These provisions are not now before us.

[Footnote 3] In denying the Government's petition for rehearing, the panel reiterated somewhat more strongly its believe that the Corps' construction of its regulation was "overbroad and inconsistent with the language of the Act." 729 F.2d, at 401.

[Footnote 4] Even were the Court of Appeals correct in concluding that a narrowing construction of the regulation is necessary to avoid taking of property through the application of the permit requirement, the construction adopted – which requires a showing of frequent flooding before property may be classified as a wetland – is hardly tailored to the supposed difficulty. Whether the denial of a permit would constitute a taking in any given case would depend upon the effect of the denial on the owner's ability to put the property to productive use. Whether the property was frequently flooded would have no particular bearing on this question, for overbroad regulation of even completely submerged property may constitute a taking. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (197). Indeed, it may be more likely that denying a permit to fill frequently flooded property will prevent economically viable use of the property than denying a permit to fill property that is wet but not flooded. Of course, by



excluding a large chunk of the Nations' wetlands from the regulatory definition, the Court of Appeals' construction might tend to limit the gross number of takings that the permit programme would otherwise entail; but the construction adopted still bears an insufficiently precise relationship with the problem it seeks to avoid.

[Footnote 5] *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), in which we adopted a narrowing construction of a statute to avoid a taking difficulty, is not to the contrary. In that case, the problem was that there was a substantial argument that retroactive application of a particular provision of the Bankruptcy Code would in every case constitute a taking; the solution was to avoid the difficulty by construing the statute to apply only prospectively. Such an approach is sensible where it appears that there is an identifiable class of cases in which application of a statute will necessarily constitute a taking. As we have observed, this is not such a case: there is no identifiable set of instances in which mere application of the permit requirement will necessarily or even probably constitute a taking. The approach of adopting a limiting construction is thus unwarranted.

[Footnote 6] Because the Corps has now denied respondent a permit to fill its property, respondent may well have a ripe claim that a taking has occurred. On the record before us, however, we have no basis for evaluating this claim, because no evidence has been introduced that bears on the questions of the extent to which denial of a permit to fill this property will prevent economically viable uses of the property or frustrate reasonable investment-backed expectations. In any event, this lawsuit is not the proper forum for resolving such a dispute: if the Corps has indeed effectively taken respondent's property, respondent's proper course is not to resist the Corps' suit for enforcement by denying that the regulation covers the property, but to initiate as suit for compensation in the Claims Court. In so stating, of course we do not rule that respondent will be entitled to compensation for any temporary denial of sue of its property should the Corps ultimately relent and allow it to be filled. We have not yet resolved the question whether compensation is a constitutionally mandated remedy for "temporary regulatory takings," see *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and this case provides no occasion for deciding the issue.

[Footnote 7] The Court of Appeals seems also to have rested its frequent-flooding requirement on the language in the regulation stating that wetlands encompass those areas that "under normal circumstances do support" aquatic or semiaquatic vegetation. In the preamble to the final regulation the Corps explained that this language was intended in part to exclude areas characterized by the "abnormal presence of aquatic vegetation in a nonaquatic

area." 42 Fed. Reg. 37128 (1977). Apparently, the Court of Appeals concluded that the growth of wetlands vegetation in soils saturated by ground water rather than flooded by waters emanating from an adjacent navigable water or its tributaries was "abnormal" within the meaning of the preamble. This interpretation is untenable in light of the explicit statements in both the regulation and its preamble that areas saturated by ground water can fall within the category of wetlands. It would be nonsensical for the Corps to define wetland to include such areas and then in the same sentence exclude them on the ground that the presence of wetland vegetation in such areas was abnormal. Evidently, the Corps had something else in mind when it referred to "abnormal" growth of wetlands vegetation – namely, the aberrational presence of such vegetation in dry, upland areas.

[Footnote 8] We are not called upon to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not [474 U.S. 121, 132] adjacent to bodies of open water, see 33 CFR 323.2(a)(2) and (3) (1985) and we do not express any opinion on that question.

[Footnote 9] Of course, it may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment – or where its importance is outweighed by other values – the Corps may always allow development of the wetland for other uses simply by issuing a permit. See 33 CFR 320.4(b)(4) (1985)

[Footnote 10] Cong. Rec. 39209 (1977); see also *id.*, at 39210 (statement of Sen. Wallop); *id.*, at 39196 (statement of Sen. Randolph); *id.*, at 38950 (statement of Rep. Murphy); *id.*, at 38994 (statement of Rep. Ambro).

[Footnote 11] To be sure, 404(g)(1) does not conclusively determine the construction to be placed on the use of the term "waters" elsewhere in the Act (particularly in 502(7), which contains the relevant definition of "navigable waters"); however, in light of the fact that the various provisions of the Act should be read in *pari materia*, it does at least suggest strongly that the term "waters" as used in the Act does not necessarily exclude "wetlands." [474 U.S. 121, 140]

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**DECISION NO. A28/99**

**IN THE MATTER**

of the Resource Management Act 1991

AND

**IN THE MATTER**

of three appeals under section 120 of the Act

**BETWEEN**

**THE AUCKLAND CITY COUNCIL**  
(RMA 376/97 and RMA 384/97)  
**TRANZ RAIL LIMITED**  
(RMA 392/97)

Appellants

**AND**

**THE AUCKLAND REGIONAL COUNCIL**

Respondent

**BEFORE THE ENVIRONMENT COURT**

Environment Judge DFG Sheppard (presiding)  
Environment Commissioner P A Catchpole  
Environment Commissioner F Easdale

**HEARING** at Auckland on 31 August, 1, 2, 3, 4, 7, 8, 9, 10, and 11 September, 14, 15, 16, 17, and 18  
December 1998.

**APPEARANCES**

MLS Cooper and M J Maclean for the appellants  
R Asher QC, J A Burns, and T Spinka for the respondent  
R B Brabant for Body Corporates 164980, 107678 and 95035  
R E Bartlett, W N Brandon and S J Simons for Building Owners and Managers Association Incorporated,  
New Zealand Institute of Architects (Auckland Branch), Auckland Civic Trust Incorporated and J Olsen  
J M Savage for the owners of the Ferry Building  
AMB Green for Trans Tasman Properties Limited  
J McCartney in person  
K Simmonds for Ngati Whatua o Orakei Maori Trust Board  
DH McRae in person  
E T Smith in person  
M B Hicks in person  
L J Floyd in person and for the Waitemata Harbour and Hauraki Gulf Protection Society  
B A Jones in person  
B Gregory in person  
J Olsen for A Adcock and 14 others

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## DECISION

### INTRODUCTION

#### The appeals

1. These are appeals under section 120 of the Resource Management Act 1991 against decisions refusing certain resource consents in relation to a proposal for an underground transport and parking centre in the Britomart locality of central Auckland.
2. Appeals RMA 376/97 and 384/97 by the Auckland City Council relate to the City Council's applications for earthworks (specifically the excavation of 970,000 cubic metres of soil and fill material)<sup>1</sup>; and for water permits to divert and take stated volumes of water during construction of the transport and parking centre and after it has been completed<sup>2</sup>.
3. Appeal RMA 392/97 by Tranz Rail Limited relates to its application to take groundwater during the construction of a railway tunnel leading to the proposed transport centre<sup>3</sup>.

#### The parties

4. The Auckland City Council is the territorial authority for the district in which the site is located. Its status in these proceedings is as applicant for two of the resource consents the refusal of which is challenged in these appeals, and as owner of the site. As territorial authority it is also the controlling authority of the roads forming part of, and adjoining, the site.
5. Tranz Rail Limited operates railway services, and was the applicant for the other resource consent the subject of these proceedings, relating to taking groundwater during construction of the proposed railway tunnel leading to the transport centre.
6. The Auckland Regional Council is the primary consent authority to which the resource consent applications were made. It appointed a panel of three independent commissioners to hear and decide the applications. Their decisions refusing those consents are the subject of these appeals, so it is the respondent to these appeals.
7. Body Corporates 164980, 107678, and 95035 are the owners of buildings adjoining the site at 148 and 152

Quay Street and the building at the corner of Quay Street and Queen Elizabeth Square known as Endeans Building. Each of them had given notice of its opposition to these appeals. However at the start of the hearing of these appeals they announced that they had reached agreement with the City Council, that they had expressly given written approval<sup>4</sup> to the applications before the Court, and they withdrew from the proceedings. Their counsel, Mr Brabant, took no further part in the proceedings.

8. The Building Owners and Managers Association Incorporated, the New Zealand Institute of Architects (Auckland Branch), the Auckland Civic Trust Incorporated and Mr Jonathan Olsen had made submissions in opposition to the resource consent applications, and had taken part in the primary hearing by commissioners appointed by the Regional Council. We were left to suppose that the interests of the first three are evident from their names, as no representative of any of those organisations gave any evidence. Mr Olsen is a partner in a partnership which owns a building at 57-59 Customs Street known as Stamford House. Those submitters presented a joint case in opposition to these appeals, but did not oppose a proposed consent order in respect of diversion of groundwater during construction of the railway tunnel.

9. For convenience we will refer to those submitters as the BOMA group. Nothing is to be inferred from that about the relative significance of the various parties who made up the group. It is simply a convenient way of referring to four parties with diverse interests on whose behalf a joint case was conducted.

10. Although represented by counsel at the start of the appeal hearing, the owners of the Ferry Building, and Trans Tasman Properties Limited, did not take active parts in the hearing of these appeals. Ms McCartney and Mr Gregory did not take active parts either; and although Mr Smith cross-examined four of the expert witnesses called on behalf of the appellants, he took no further part in the proceedings.

11. Counsel for the Ngati Whatua o Orakei Maori Trust Board appeared at the start of the appeal hearing and announced that Ngati Whatua supported the grant of the resource consents. The board took no further part in the proceedings.

12. Mr D H McRae is an architect who had made a submission in opposition to the resource consent applications, and made submissions at the primary hearing.

<sup>1</sup> This application is identified as Sc/11143.

<sup>2</sup> This application is identified as Dg/11104.

<sup>3</sup> This application is identified as Ag/11156.

<sup>4</sup> In terms of section 104(6)(c) of the Resource Management Act 1991.

He took an active part in the appeal hearing in opposition to the appeals, cross-examined witnesses for the appellants and for the Regional Council, called a witness<sup>5</sup> in support of his case, and himself gave evidence.

13. Mrs M B Hicks has maritime experience and an interest in climate, and had lodged a submission in opposition to the resource consent applications. She cross-examined some witnesses, and herself gave evidence, in opposition to the appeals – with particular reference to adverse effects on the proposed transport centre of extreme meteorological events and rising sea levels.

14. Mr L J Floyd had also made a submission in opposition to the resource consent applications, and took an active part in the hearing of the appeals, cross-examining witnesses for the appellants and the respondent, and giving evidence himself.

15. Although represented at the start of the appeal hearing, the Waitemata Harbour and Hauraki Gulf Protection Society did not take an active part in the proceedings.

16. Mr B A Jones, who had made a submission in opposition to the resource consent applications, cross-examined five expert witnesses called on behalf of the appellants, and gave evidence himself in opposition to the City Council's applications.

17. On behalf of the 15 persons represented by himself, Mr Olsen cross-examined two of the appellants' witnesses and called two of them<sup>6</sup> to give evidence in opposition to the applications.

### **Prehearing proceedings**

18. On 8 August 1997 the Court heard a contested motion by the appellants to strike out certain issues that had been raised by parties in opposition to the appeals. The Court's decision on that motion<sup>7</sup> was given on 25 August 1997. By that decision the Court held that submissions and evidence which were only relevant to the effect of the designation for the transport centre could not be entertained in these appeals. The use of the site for the designated purpose had already been determined in earlier proceedings, and would not follow on from the granting of the consent under appeal.

### **Appeal hearing**

19. Originally estimated to occupy 10 days, the hearing turned out to require 15 hearing days<sup>8</sup>. In total, 30 witnesses were called, and numerous exhibits were produced, many of them technical in nature. Most of the expert witnesses were cross-examined at length. In addition (there being no objection), signed statements by four further witnesses for the appellants<sup>9</sup> were received in evidence, the witnesses being excused from attendance.

20. Most of the contention, and much of the expert evidence, related to the diversion of groundwater at the transport and parking centre, and the likely effects of that, particularly on the stability of existing buildings in the vicinity.

### **Tranz Rail tunnel**

21. Tranz Rail's application relates to the construction of a tunnel for trains leading into the transport centre site from the east to link rail and bus passenger services. Early construction of the tunnel is intended to enable rail transport of excavation material from the transport centre. The tunnel has been anticipated by a section already built under Tinley Street to the east.

### **DESCRIPTION**

#### **The site and surroundings**

22. The site for the transport centre is bounded by Quay Street, Britomart Place, Customs St and Queen Elizabeth Square, together with part of Quay Street to the north, and the railway tunnel to the east. The total area is about 5 hectares.

23. The central part of the site (on a west-east axis) is occupied by the former chief post office building and annexe to its rear, the existing bus terminal, and the Britomart carparking building. To the south there are buildings fronting Customs Street occupied for retail, restaurant and other commercial activities. To the north there are buildings fronting Quay Street which are used for a range of commercial activities.

24. On the edge of the site, but beyond its boundaries, there are the Novotel Hotel at the corner of Customs Street

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5 Assoc-Prof C A Bird.

6 Messrs I F Shaw and P G Eccles.

7 Environment Court Decision A101/97.

8 Submissions in reply by counsel for the appellants were, by leave, presented in writing on 23 December 1998, after the close of the oral hearing the previous week.

9 The witnesses were Sir Hugh Kawharu, Messrs TBS Carr and C H Jenkins, and Dr K R Laing.

and Queen Elizabeth Square, Endeans Building (apartments) at the corner of Quay Street and Queen Elizabeth Square, apartment buildings at 152 (“Harbour View”) and 148 Quay Street, and the Union Shipping building on Quay Street east of Commerce Street.

### **The proposal**

25. The Britomart Transport Centre is proposed as a five-level underground development. Level 1 underground would be carparking, including 500 spaces for use by the public. Level 2 would accommodate the transport station for buses and trains. There would be four railway lines and provision for 68 buses, which would gain access from Customs Street and from Quay Street. (The main carriageway of Quay Street would need to be lowered to allow bus ingress and egress at this level.) There would be pedestrian access from Queen Elizabeth Square through the former Chief Post Office building, and access for taxis from Customs Street. Basement levels 3, 4 and 5 would contain more carparking spaces.

26. The City Council made clear that although the current proposal involves lowering the main carriageway of Quay Street from Britomart Place to Queen Elizabeth Square, it now proposes extending the lowering of the carriageway further to the west to Lower Hobson Street. A separate application has been made for the resource consents required for that.

27. The City Council’s proposal involves constructing a perimeter retaining wall around the site prior to any excavation below groundwater level. The perimeter wall is intended to resist seismic loads and to act as a retaining wall supporting the soil and water loads acting on basement from outside. The perimeter retaining wall is to be constructed with overlapping cast-in-situ concrete piles (referred to as secant piles) socketed into the unweathered Waitemata Group bedrock underlying the site. It is designed to provide a watertight seal around the excavation, and it would extend to a depth of up to 14 metres below the Basement 5 level. However it is significant that the underground structure is not designed to be completely sealed, and would require continuing dewatering after completion. The City Council accepted that the structure should be capable of being sealed.

### **Modifications**

28. Originally, basement levels 3, 4 and 5 would have extended to beneath the eastern edge of the former chief post office building. However in December 1997 the City Council proposed a modification by which the extent of those levels would be reduced at that western end. The

excavation would only extend to B2 level for the 75 metres at the western end, and the third, fourth and fifth basement levels would terminate at a retaining wall located 75 metres from the western boundary. The B2 slab within the western 75 metres of the building and 50 metres of the B5 slab to the east of the new retaining wall would be designed to resist hydrostatic uplift pressures.

29. Of the 2010 carparking spaces that could have been provided on the original design, 364 would be lost, although some might be recouped by rearrangement of the parking layout in the reduced levels.

30. In the design as modified, part of the perimeter retaining wall was to be extended as a sealed wall for 50 metres along Customs Street. The adjacent slab was to be drained, not sealed. To the west of that part of the wall, the wall and the basement slab were both to be sealed. A further modification was agreed to by the appellants and the respondent prior to the start of the appeal hearing. It was for a fully sealed wall extending to a depth of –30 metres RL<sup>10</sup> on the south side of the excavation for a length of 125 metres extending eastwards adjacent to the unsealed portion of the B5 floor slab.

### **Conditions proposed by appellants and respondent**

#### *Earthworks*

31. By the start of the appeal hearing the appellants and the respondent had reached agreement on conditions on which consent might be granted for the earthworks. The proposed conditions set minimum discharge standards for turbidity, a monitoring programme, provision for reviews of conditions, and a requirement for a bond.

#### *Transport centre water permit*

32. The appellants and the respondent had also reached agreement on extensive sets of conditions on which consents might be granted for the water permits, both for the transport centre and for the railway tunnel. They would require that the excavation and underground development be designed and constructed so as to cause no damage to buildings surrounding the site; and requiring repair of any damage. They would also require a detailed structural condition survey of listed buildings and a wider building survey. There would have to be a bond in the sum of \$20 million, the amount to be varied in accordance with the Works Construction Cost Index. There would also have to be a monitoring and contingency plan. Water discharged would have to meet the quality standards set for the earthworks consent. There is provision for an audit group whose approval would be required for any changes in design.

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<sup>10</sup> That is, to a depth 14 metres below the level of the B5 slab.

33. Another condition would require a fully sealed wall extending to a depth of –30 metres RL on the south side of the excavation for a length of 125 metres extending eastwards adjacent to the unsealed portion of the B5 floor slab.

34. The conditions set a comprehensive programme for monitoring of groundwater levels and pressures, of building settlements, and of wall and pile deflections; and stipulate trigger levels and responses in respect of each. In addition the consent-holder would be required to demonstrate that the shear forces and bending moments induced in the piles supporting adjacent buildings do not exceed stated values, and to install pre-stressed steel ties sufficient to hold the walls within prescribed deflection limits. The conditions would provide for annual review.

35. The conditions would require the consent holder to retain an independent audit group of up to four persons, who would be briefed by, and report to, the Regional Council. The role of the audit group would be to provide expert independent advice to the Regional Council, and would include reviewing monitoring data, reviewing dewatering of the site, any ground or building settlement and retaining wall movement, reviewing complaints from building owners or other affected parties, requiring and reviewing remedial actions, recommending review of the conditions, reviewing and approving the monitoring and contingency plan, and checking compliance with the conditions.

36. The agreed conditions are comprehensive and rigorous. In addition, further conditions were proposed in accordance with the City Council's agreement with the owners of the buildings at 148 and 152 Quay Street and Endeans Building. The additional conditions would require four additional carparking spaces to be provided on the covered underpass to the east of the western portal, and require that the western portal to be constructed and detailed in accordance with certain recommendations by Mr R J Pryor.

#### *Railway tunnel water permit*

37. The appellants and the respondent had also reached agreement on conditions on which consent to divert groundwater during construction of the railway tunnel might be granted; and further conditions were added to meet the cases of other parties. The conditions would require sediment control measures so as to comply with the conditions for permitted activities in the regional plan; and would prohibit discharge from the site of contaminated water which does not comply with the quality standards set for the earthworks for the transport centre. Likewise the conditions would stipulate that there is to be no damage to buildings and services surrounding the site, and would have provision for review.

38. Two additional conditions requested by Mr Floyd were agreed to by Tranz Rail. One related to the quality of

water disposed from the tunnel construction to the City stormwater system; and the other would require a wheel wash to avoid loose material from the site being carried on vehicle tyres and deposited on public roads.

## **CASES FOR PARTIES**

### **Appellants**

39. It was the City Council's case that the relevant effects on the environment of the transport centre excavation, being matters for which the Regional Council had restricted the exercise of its discretion, would be minor and would be avoided or adequately mitigated by the conditions proposed, so that there would be no appreciable effect of granting the consent.

40. Counsel for the appellants submitted that in the context of the regional plan the excavation only requires resource consent for the purposes of sediment control, and the matters to which the Regional Council has restricted its discretion to grant or refuse consent are limited to that. Mr Cooper reminded us that the groundwater from the excavations is to be diverted to the City's stormwater system, and that is not a subject of contention in these proceedings.

41. In respect of the water permits, the appellants submitted that the effects on the environment to be considered should be limited by what is sought to be authorised, namely diversion of groundwater. It was contended on their behalf that, subject to compliance with the agreed conditions, there would not be significant environmental effects, and the consents could safely be granted. They refuted the criticisms that the conditions are not appropriate and not achievable.

### **Respondent's attitude**

42. Although the commissioners appointed by the Regional Council had refused the consents sought, at the appeal hearing the respondent no longer opposed the proposal (which by then had been substantially modified) on the basis of the conditions on which it had reached agreement with the appellants, and further amended as recommended in evidence by Mr A G Smaill. The Regional Council took the attitude that the reservations that had influenced the commissioners to refuse consent would be met by the modified design, and any adverse environmental effects would be controlled by the conditions.

### **Cases for opponents**

#### *BOMA group*

43. The principal opposition to the consents for the transport and parking centre was that presented on behalf of the BOMA group. Those parties did not oppose the water diversion during construction of the railway tunnel. They

did oppose the earthworks, and the diversion of groundwater during and after construction of the transport and parking centre. The basis of their opposition was potential effects on the environment, namely damage to land and buildings in the vicinity from ground movement resulting from the excavation, and the diversion of groundwater.

44. Counsel for the BOMA group, Mr Bartlett, submitted that in addressing the earthworks consent, the Court has to consider the cumulative effects of the development as a whole, including any effect of the proposed excavation, in particular instability and soil creep. Counsel accepted that the Court is not to consider matters that had already been addressed in the designation appeals.

45. Mr Bartlett referred to the proposed condition 2:

The excavation and underground development are to be designed and constructed in a manner in which there is no damage to buildings surrounding the site.

46. Counsel observed that the City Council was not seeking, and could not reasonably seek, a licence to cause physical damage up to a certain degree. He referred to the law of private nuisance<sup>11</sup>, and submitted that the appellants “must satisfy the parties and the Court that this condition is capable of fulfilment”; that the Court has to go beyond the City Council’s assurances to see if that is an achievable condition; and be satisfied that that would be a reasonable outcome of the design and construction techniques that are proposed.

47. Mr Bartlett also criticised the proposed conditions put forward by the appellants and the respondent. In particular he submitted that if the consent holder is unable to comply with Condition 2, all construction should cease; that to enable better assessment of potential ground settlement effects, surveys of existing structural conditions of buildings should be completed prior to a consent being granted by the Court; that the amount of the proposed bond is insufficient; that the monitoring and contingency plan should be decided by the Court; that the technical audit group should be retained by the Regional Council at the consent-holder’s cost; and that provision for the audit group to approve variations of conditions of consent without recourse to or hearing private interests that might be affected is an objectionable dispensing power.

*D H McRae*

48. It was Mr McRae’s case that there is not sufficient evidence to justify the risk to the environment that could

occur by the taking and diversion of water; that inadequate consideration had been given to alternative designs which could reduce the amount of water taken or diverted; that the modified proposal would present some problems for other buildings in the northern area of the central business district. He submitted that there was no evidence of a public benefit from the proposal that would warrant taking and diverting so much water.

49. Mr McRae submitted that the western extension to Lower Hobson Street of the lowering of the Quay Street carriageway is inextricably connected with the proposal before the Court and that to consider the present appeals without reference to it is not in accordance with section 91 of the Resource Management Act.

50. Mr McRae also informed the Court that he had made a submission about the boundaries of the area affected by the designation for the transport centre in the proposed district plan (Central Area section). He submitted that the Court cannot decide the present appeals until the site has been defined in the district plan because this would prejudice the outcome of the proceedings on his district plan submission. He accepted that alternatively the Court could make it a condition of consent that the site be confined to that already designated.

51. Mr McRae drew attention to the absence of any witness responsible as author for the design of the scheme as a whole, and the absence of alternatives that might take and divert less water and preserve the stability of nearby buildings. He submitted that the lack of such evidence prevents the Court from granting consent, because there is no evidence to rely upon in making its decision. He also claimed that the drawings that had been produced in evidence did not show access to Levels 3, 4, and 5 to demonstrate that the perimeter wall to Customs Street would not be deformed by water pressure, lacking direct support from the floors that are to be omitted. Further he asserted that resource consent could not be granted until the plans had been amended to show a mezzanine floor for parking spaces lost by shortening those levels.

52. This submitter referred to the proposed condition that the structure be designed and constructed so that it is able to be sealed, and contended that there was no evidence that it would be able to be sealed after completion. He referred in particular to the existence of an air extraction plenum.

53. Mr McRae also urged that the audit group be increased by adding a person representative of the public appointed because of their wide expertise rather than being a specialist engineer.

<sup>11</sup> Citing *Clearlite Holdings v Auckland City* [1976] 2 NZLR 729.

*M B Hicks*

54. Mrs Hicks urged that Auckland's local authorities should investigate the possible effects of climate change on the region, including the Britomart development and the underpass in Quay Street. She observed that increased rainfall could raise groundwater levels, and together with a rise in mean sea level this could change the dynamics of the groundwater regime. Mrs Hicks also observed that prolonged periods of heavy rain could delay construction and increase cost.

55. This submitter also urged that consideration be given to the possibility of tsunamis and storm surges causing the water of the harbour to overtop seawalls and flood the Quay Street underpass, although she acknowledged that it is unlikely that seawater would enter the Britomart transport centre itself.

56. Mrs Hicks submitted that the evidence had not shown that these possibilities had been taken into consideration in the design of the project.

*L J Floyd*

57. In respect of the Tranz Rail application, it was Mr Floyd's case that it should be "struck out for want of evidence". He referred particularly to monitoring the volume and quantity of water drawn off, and to protection of the surrounding environment by hay bales, bunds, sediment controls, and wheel-washes.

58. In respect of the City Council's applications, it was Mr Floyd's case that insufficient investigations had been made about the ground conditions at the site. He cited several references in technical evidence for the appellants to further testing of ground conditions intended prior to construction.

*B A Jones*

59. Mr Jones presented two main concerns. The first was the risk of harbour water entering the underground development when a storm coincides with a spring tide, or as a result of a tsunami. The second was that careful planning to eliminate all possible mistakes, accident and other disasters can be negated by an event which is overlooked or considered totally impossible. He cited examples of failure in other major engineering works. Mr Jones concluded his evidence with what he called "a very wise saying" which he claimed was totally applicable to the proposal: When in doubt, DON'T.

*A Adcock and others*

60. The attitude of these submitters was exemplified by two of their number who gave evidence, Mr I F Shaw and Mr P G Eccles. Their concerns were disruption to their retail businesses in the downtown area due to diversion of bus and general traffic, loss of kerbside carparking spaces, and resulting traffic congestion, during construction of the transport and parking centre, and the associated lowering of the Quay Street carriageway, over a period of two or three years.

## RELEVANT CONSIDERATIONS

### Resource consents required

61. The City Council and the respondent accepted that the excavation earthworks for the transport and parking centre<sup>12</sup> require resource consent under the proposed Regional Plan: Sediment Control; and that the resulting diversion of groundwater<sup>13</sup>, not being subject to any regional plan control, requires resource consent under section 14 of the Resource Management Act as an innominate activity<sup>14</sup>.

62. It was Tranz Rail's case that the earthworks for excavating the railway tunnel do not require resource consent in that they are outside the sediment control protection area defined in the proposed regional plan for sediment control. That was not contested. Tranz Rail and the Regional Council accepted that the diversion of groundwater during that work requires resource consent under section 14 of the Act as an innominate activity<sup>15</sup>.

### Resource Management Act 1991

63. The purpose of the Resource Management Act 1991 is stated in section 5:

5. **Purpose** – (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
- (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while –
  - (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

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12 The earthworks are the subject of Application Sc11143.

13 The diversion of groundwater for the transport and parking centre is the subject of Application Dg/11104.

14 *Te Aroha Air Quality Protection Group v Waikato Regional Council* (1993) 2 NZRMA 74.

15 The diversion of groundwater during excavation of the railway tunnel was the subject of Application Ag/11156.



- (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

64. The need for resource consents for the taking and diversion of groundwater arises under section 14 of the Act. Relevant provisions of that section<sup>16</sup> are:

**14. Restrictions relating to water** – (1) No person may take ... or divert any –

- (a) Water  
...  
unless the taking, ... or diversion is allowed by subsection (3).  
...  
(3) A person is not prohibited by subsection (1) from taking, ... or diverting any water ... if -
- (a) The taking ... or diversion is expressly allowed by a rule in a regional plan and in any relevant proposed regional plan or a resource consent;  
... –  
and the taking or use does not, or is not likely to, have an adverse effect on the environment ...

65. The word “water” is defined to mean water in all its physical forms, whether flowing or not, and whether over or under the ground<sup>17</sup>.

66. Section 104 of the Act<sup>18</sup> makes provision for matters to which regard is to be had in considering a resource consent application:

- (1) Subject to Part II, when considering an application for a resource consent and any submissions received, the consent authority shall have regard to –
- (a) Any actual and potential effects on the environment of allowing the activity; and  
...  
(c) Any ... New Zealand coastal policy statement, ... proposed regional policy statement; and
- (d) Any relevant objectives, policies, rules, or other provisions of a ... proposed plan; and
- (e) Any relevant district plan or proposed district plan, where the application is made in accordance with a regional plan; and  
...  
(h) Any relevant designations ...; and
- (i) Any other matters the consent authority considers relevant and reasonably necessary to determine the application.  
...

- (6) When considering an application for a resource consent where –
- (a) In accordance with section 94, the written approval of any person to the application had been obtained; or
- (b) In accordance with section 96, a submission to the consent authority has expressly given written approval to the application; or
- (c) In any other manner, to the satisfaction of the consent authority, a person has expressly given written approval to the application –

the consent authority shall not have regard to any actual or potential effect on that person if that person has agreed to the proposal which is the subject of the application; and the fact that any such effect on that person may occur shall not be relevant grounds upon which the consent authority may refuse to grant its consent to the application.

67. In addition, section 105 provides for making decisions on resource consent applications. Subsection (1)(b) of that section<sup>19</sup> is relevant to deciding an application for a restricted discretionary activity. Subsection (1)(c) is relevant to deciding applications for innominate activities. The material parts of the subsection read:

- (1) Subject to subsections (2) and (3), after considering an application for –  
...  
(b) A resource consent for a discretionary activity, a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108:  
Provided that, where the consent authority has restricted the exercise of its discretion conditions may only be imposed in respect of those matters specified in the plan or proposed plan to which the consent authority has restricted the exercise of its discretion:
- (c) A resource consent (other than for a controlled activity or a discretionary activity or a restricted coastal activity), a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108.

### Planning instruments

68. Before considering the relevant effects on the environment of allowing the activities, we identify the relevant objectives and policies and other provisions of the planning instruments which may be applicable.

<sup>16</sup> As amended by section 12 of the Resource Management Amendment Act 1993.

<sup>17</sup> See the definition of “water” in the Resource Management Act 1991, section 2(1).

<sup>18</sup> As amended by section 54 of the Resource Management Amendment Act 1993

<sup>19</sup> Subsection (1) as substituted by section 55(1) of the Resource Management Amendment Act 1993. By section 78(5) of the Resource Management Amendment Act 1997, these appeals have to be decided as if that amendment Act had not been enacted, so the amendment to section 105(1)(b) made by section 22(1) of that amendment Act is not incorporated, nor is subsection (3A) which was inserted by section 22(4) of that Act.

### Coastal Policy Statement

69. The *NewZealand Coastal Policy Statement*<sup>20</sup> contains the following policies:

#### Policy 1.1.1

It is a national priority to preserve the natural character of the coastal environment by:

- (a) encouraging appropriate ... development in areas where the natural character has already been compromised ...
- (b) taking into account the potential effects of ... development on the values relating to the natural character of the coastal environment, both within and outside the immediate location; and
- (c) avoiding cumulative effects of ... development in the coastal environment.

#### Policy 3.2.2

Adverse effects of ... development in the coastal environment should as far as possible be avoided. Where complete avoidance is not practicable, the adverse effects should be mitigated and provision made for remedying those effects, to the extent possible.

#### Policy 3.2.4

Provision should be made to ensure that the cumulative effects of activities, collectively, in the coastal environment are not adverse to a significant degree.

### Regional policy statement

70. The proposed *Auckland Regional Policy Statement* has reached the stage where most references to the Environment Court about its contents have been disposed of. The remaining references relate to contents which are not material to these proceedings.

71. The regional policy statement emphasises the use and development of the natural and physical resources of the region in an integrated manner, and in a way that avoids, remedies or mitigates adverse effects on the environment or amenity values. There are also provisions that emphasise the need to protect natural resources and the efficient use of physical resources.

72. The provisions of the regional policy statement which are material to these proceedings are to be given effect in the regional plans, which we refer to next, and in district plans.

### Regional plan

73. There are two proposed regional plans for the Auckland region: a regional coastal plan, and a plan for controlling sediment. The proposed coastal plan has little relevance to these appeals as the resource consent applications do not involve structures within the coastal marine area, and there is no requirement for a separate water discharge permit.

74. The proposed *Auckland Regional Plan: Sediment Control* governs land-disturbing activities. By that proposed instrument, the proposed excavations for the transport centre and for lowering the Quay Street carriageway are earthworks classified as a restricted discretionary activity for which resource consent is required<sup>21</sup>. The plan lists<sup>22</sup> the matters in respect of which the Regional Council has restricted the exercise of its discretion in the case of this class of restricted discretionary activity:

- (a) techniques used to restrict or control sediment being transported from the site and the effects or impacts of sediment on water quality from the techniques chosen, including the practicality and efficiency of the proposed control measures;
- (b) the proportion of the catchment which is exposed;
- (c) the proximity of the operation to the receiving environment;
- (d) the concentration and volume of any sediment that may be discharged;
- (e) the time during which the bare earth surface is exposed;
- (f) the time of the year when the activity is undertaken;
- (g) the duration of the consent;
- (h) monitoring the volume and concentration of any sediment that may be discharged;
- (i) administrative charges under section 36 of the RM Act;
- (j) bonds under section 108(1)(b) of the RM Act;
- (k) provision for obtaining Environmental Benefits (Financial Contributions – Refer to Section 5 of this Plan).

75. Objectives and policies of the plan include these:

#### 5.1 Objectives

5.1.1 To maintain or enhance the quality of water in water bodies and coastal water.

5.1.2 To sustain the mauri of water in waterbodies and coastal waters, ancestral lands, sites, waahi tapu and other taonga.

20 *NZ Gazette*, 5 May 1994, page 1563.

21 Rule 5.4.3.1 in Table C.

22 In Rule 5.4.3.2.

## 5.2 *Policies*

5.2.1 Land disturbance activities which may result in the generation and discharge of elevated levels of sediment will be required to employ methods which avoid, remedy or mitigate adverse effects on the quality of water in waterbodies and coastal waters.

5.2.2 Land disturbance activities which may result in the discharge of elevated levels of sediment into waterbodies and coastal waters shall be considered inappropriate where they will have a significant adverse effect on:–

- (i) the qualities, elements and features which contribute to the natural character of areas of the coastal environment ...
- (ii) outstanding and regionally significant natural features and landscapes ...
- (iii) areas of significant indigenous vegetation and significant habitats ...
- (iv) areas of significance to Tangata Whenua as identified in the Auckland regional policy statement and the Auckland Regional Plan: Coastal.
- (v) areas identified by Tangata Whenua in accordance with Tikanga Maori as being of special spiritual, cultural and historical significance, unless the adverse effects can be avoided, remedied or mitigated.

76. The associated explanation states<sup>23</sup> :

Operations that expose the soil or bare earth may also make that surface vulnerable to erosion and subsequent sediment discharge ... Depending on the location of these works, they can have a direct influence on the receiving environment ... In almost all cases, this impact can be reduced or avoided by adherence to a number of common sense principles and design considerations which are easy to adhere to and inexpensive to implement.

### *Auckland City district plan*

77. The proposed transport and parking centre is the subject of a designation in the operative district plan. Development of the site for that purpose is subject to a comprehensive set of conditions that dictate how the designation is to be implemented. All underground development is to take place generally in accordance with the plans forming part of the district plan and is to meet the conditions. Corresponding provision has been made in the relevant section proposed district plan which was publicly notified in November 1997. The Tranz Rail tunnel to the east also has the authority of a designation in the operative and proposed district plans.

78. The Regional Council submitted that the district plan is not relevant on consideration of these resource consent applications. Strictly that is correct, and we refer to the relevant provisions as a matter of background record, not as matters which should influence the outcome of the appeals.

### *Regional land transport strategy*

79. The *Auckland Regional Land Transport Strategy* was prepared by the Regional Council under the Land Transport Act 1993. As such it is not one of the classes of planning instruments to which we are required by section 104(1) to have regard.

80. However section 104(1)(i) allows other matters to be taken into account where they are relevant and reasonably necessary to determine a resource consent application. The appellants urged the Court to have regard to provisions of this instrument. Their counsel observed that section 61(2)(a)(i) of the Resource Management Act 1991 directs regional councils preparing a regional policy statement to have regard to strategies prepared under other Acts; that section 29F(3) of the Land Transport Act 1993<sup>24</sup> directs that such a strategy is not to be inconsistent with regional policy statement and plans; and that the proposed *Auckland Regional Policy Statement* prescribes<sup>25</sup> that new regional infrastructure is to be planned and undertaken in ways that promote the regional transport objectives as expressed in the *Regional Land Transport Strategy*.

81. No party submitted to the contrary. Having regard to the cross-referencing between the two Acts, and the instruments made under them, we find that the regional land transport strategy is relevant to the proposed transport centre and that it is reasonably necessary to have regard to it.

82. The regional strategy contains this method of implementing policy<sup>26</sup>–

Giving urgency to extension of the passenger rail system to Britomart in conjunction with upgrading the Britomart passenger transport terminal to provide a high standard terminal with good facilities for passengers and good connection to bus and ferry services.

### **Maori relationship**

83. The evidence of Sir Hugh Kawharu, Chairman of the Ngati Whatua o Orakei Maori Trust Board, was unchallenged. On that evidence we find that Ngati Whatua

<sup>23</sup> Proposed *Auckland Regional Plan: Sediment Control*, page 26.

<sup>24</sup> Section 29F was inserted by section 5 of the Land Transport Amendment Act 1995. (The Land Transport Act 1993 was repealed by the Land Transport Act 1998, which commenced on 1 March 1999. By section 229(3) of the Land Transport Act 1998, the regional land transport strategy continues to have effect as if made under Part 13 of that Act.)

<sup>25</sup> Section 2.6.7.

<sup>26</sup> Method 4.6.1.

o Orakei are tangata whenua, and have mana whenua status over the proposed site; that the Trust Board represents them; that it supports all the appeals; and that there are no matters properly of concern to Maori that stand in way of consent being granted to the applications. The Regional Council reported that Trust Board had given approval of the applications in writing.

84. No party suggested that exercise of the consents would adversely affect any cultural values of Maori<sup>27</sup>, or any principle of the Treaty of Waitangi<sup>28</sup>.

## IRRELEVANT CONSIDERATIONS

### Earthworks consent

85. The appellants and the respondent joined issue with the opponents' submissions that the Court should take into account all effects of the excavation earthworks. The only legal argument for the opponents' attitudes was that presented by Mr Bartlett on behalf of the BOMA group. He relied on the opening words of section 104(1) ("Subject to Part II...") and on the Environment Court decision in *Aquamarine v Southland Regional Council*<sup>29</sup>.

86. Mr Cooper observed that the proposed *Regional Plan : Sediment Control* (under which resource consent is required for the earthworks) classifies various land-disturbing activities as permitted activities, controlled activities, and restricted discretionary activities. Counsel submitted that the excavations for the transport centre and for lowering Quay Street are classified as restricted discretionary activities, and he referred to the part of the definition of the term 'discretionary activity' which relates to a consent authority restricting the exercise of its discretion to matters specified in the plan for a certain class of activity.

87. Mr Cooper contended that Rule 5.4.3.2 of the plan sets out the matters to which the Regional Council had restricted the exercise of its discretion in the case of this restricted discretionary activity. He argued that the consent necessary to carry out the excavation is only controlled for the purpose of sediment control, and that matters relevant to whether or not consent should be granted for that activity are similarly limited. He cited the Environment Court's decision in *Rudolph Steiner v Auckland City Council*<sup>30</sup>, the material reasoning in which<sup>31</sup> had been referred to with approval by the High Court in *Aley v North Shore City Council*<sup>32</sup>.

88. Mr Cooper also referred to subsection (3A), which was inserted in section 105 by the Resource Management Amendment Act 1997. Counsel acknowledged that these appeals have to be decided as if that amendment had not been enacted. However he contended that the opening words of the subsection ("For the avoidance of doubt ...") show that Parliament did not consider it was changing the law.

89. The Regional Council agreed with the appellants' submission in this regard.

90. Parliament introduced the concept of restricted discretionary activities into the Resource Management Act regime by the Resource Management Amendment Act 1993. It inserted in section 76, which governs district rules, a new subsection (3B):

- (3B) Where a rule in a district plan or proposed district plan provides for a discretionary activity, the rule may also –
- (a) State the standards and terms that the activity shall comply with; and
  - (b) State the matters to which the territorial authority has restricted the exercise of its discretion; and
  - (c) If the territorial authority has restricted the exercise of its discretion in accordance with paragraphs (a) and (b), state whether an application for a resource consent may be considered without notification or the need to obtain the written approval of affected persons in accordance with section 94(1A).

91. To give effect to the concept in the process for deciding applications for discretionary activities, Parliament also amended section 105(1)(b) by adding a proviso. The subsection with the proviso added<sup>33</sup> read as follows–

- (1) Subject to subsections (2) and (3), after considering an application for–
- ...
- (b) A resource consent for a discretionary activity, a consent authority may grant or refuse the consent, and (if granted) may impose conditions under section 108:

Provided that, where the consent authority has restricted the exercise of its discretion, conditions may only be imposed in respect of those matters specified in the plan or proposed plan to which the consent authority has restricted the exercise of its discretion ...

27 Resource Management Act 1991, sections 6(e), and 7(a).

28 Resource Management Act 1991, section 8.

29 (1996) 2 ELRNZ 361.

30 (1997) 3 ELRNZ 85.

31 At 3 ELRNZ 87.

32 [1998] NZRMA 361, 374; 4 ELRNZ 227, 243.

33 Because these appeals have to be decided as if the Resource Management Amendment Act 1997 had not been enacted, the words inserted in the proviso to section 105(1)(b) by section 22(1) of that amendment Act have been omitted from this quotation.

92. Further, Parliament amended the definition of the term ‘discretionary activity’ by substituting the following—

“Discretionary activity” means an activity—

- (a) Which is provided for, as a discretionary activity, by a rule in a plan or proposed plan; and
- (b) Which is allowed only if a resource consent is obtained in respect of that activity; and
- (c) Which may have standards and terms specified in a plan or proposed plan; and
- (d) In respect of which the consent authority may restrict the exercise of its discretion to those matters specified in a plan or proposed plan for that activity.

93. Prior to the further amendment in 1997, the wording of the proviso to section 105(1)(b) left room for doubt whether it was intended that, in deciding an application for a restricted discretionary activity, a consent authority could refuse consent on the basis of factors other than those specified in the plan. However there was nothing in the new section 76(3B), or in paragraph (d) of the new definition of ‘discretionary activity’ which gave support for that doubt.

94. Mr Bartlett relied on the opening words of section 104(1) (“Subject to Part II ...”). In response to a question from the Court, Mr Bartlett stated that he did not submit to the contrary of the interpretation of those words given by the Court in other decisions. The Court has held that the effect of the opening words “Subject to Part II ...” is that the general direction “to have regard to” the matters listed does not apply to any one or more of those matters where to do so would conflict with something in Part II<sup>34</sup>. We do not accept that this general provision was intended to add the broad matters stated in Part II to the matters expressly specified in a district plan as relevant considerations for deciding applications for restricted discretionary activities. That would deprive restricted discretionary activities of their distinctive quality.

95. We now address the argument presented by Mr Bartlett based on the decision in the *Aquamarine* case. The resource consents sought in that case were not restricted discretionary activities. Although, with respect, *Aquamarine* contains a valuable analysis of the scope of considerations in considering a discretionary activity, it does not provide guidance about the scope of the matters which it is permissible for a consent authority to consider on a restricted discretionary activity.

96. As Mr Bartlett pointed out, the *Rudolph Steiner* decision relied on by Mr Cooper was not a case of a restricted discretionary activity. Since the end of the hearing on these appeals, two of us have given a decision in other proceedings which did concern a restricted discretionary activity: *Cullen v Kaipara District Council and Trail*<sup>35</sup>. In that case the Court held that in deciding an appeal against consent for a restricted discretionary activity the consent authority could refuse consent only on grounds arising from matters to which the exercise of discretion had been restricted.

97. *Cullen* was an appeal lodged after the commencement of the Resource Management Amendment Act 1997, so section 105(3A) of the principal Act<sup>36</sup> was applicable.

98. Because the present appeals were commenced prior to the enactment of the Resource Management Amendment Act 1997, they have to be decided as if that Act had not been enacted<sup>37</sup>. However we accept Mr Cooper’s submission that the opening words of subsection (3A) (“For the avoidance of doubt ...”) show that, in inserting that subsection, Parliament did not consider it was changing the law. Other provisions of the principal Act prior to the 1997 amendment also indicate the same intention<sup>38</sup>. It is consistent with the decision in *Rudolph Steiner*.

99. Having addressed the submissions in this case, we consider that the understanding of the scope of relevant considerations for deciding restricted discretionary activities expressed in *Cullen* was not altered by the further amendment to section 105(1)(b) made in 1997. Despite the opening words of section 104(1) (Subject to Part II ...), we hold that in considering a restricted discretionary activity a consent authority is restricted to considering the matters to which, by the relevant plan, the exercise of discretion has been restricted. That is what distinguishes restricted discretionary activities from discretionary activities that are not restricted. To hold that other matters, derived from Part II or elsewhere, might be considered as well, would fail to give effect to the clear intent of the provisions of the Act about restricted discretionary activities.

100. As counsel for the appellants observed, this is not to hold that the stability of the proposed excavation cannot be considered. Mr Cooper acknowledged that it can be considered in the context of the application for consent to take and divert groundwater. But it may not be considered in deciding the application for the earthworks consent.

<sup>34</sup> *Paihia & District Citizens Assoc Inc v Northland Regional Council* Planning Tribunal Decision A77/95; *Russell Protection Society v Far North District Council* Environment Court Decision A 125/98.

<sup>35</sup> Environment Court Decision A15/99.

<sup>36</sup> Subsection (3A) was inserted in section 105 of the principal Act by section 22(4) of the Resource Management Amendment Act 1997.

<sup>37</sup> Resource Management Amendment Act 1997, section 78(5).

<sup>38</sup> See section 76(3B) as inserted by section 40(3) of the Resource Management Amendment Act 1993; paragraph (d) of the definition of the term “discretionary activity” as substituted in section 2(1) by section 2(10) of the same amendment Act; and the proviso to section 105(1)(b) as substituted by section 55(1) of that amendment Act.

### Utility of transport centre

101. Consistent with the Court's decision on the motion to strike out<sup>39</sup>, we hold that contentions going to the wisdom or merit of the Britomart transport centre proposal, or to its utility for transport operators, are not relevant to these proceedings. They may properly be the subject of debate in political forums, but we should not take those issues into account in deciding these appeals. Consistent with that decision we also treat any financial risk of the development as irrelevant, except in respect of the amount of a bond.

### Benefits of the project

102. The appellants submitted that the proposed transport centre and railway tunnel serving it would contribute very positively to the ability of the people of Auckland City and the wider Auckland region to provide for their social and economic well-being, because the consents would enable construction of a modern transport centre, uniting facilities for buses and trains in close proximity to ferry services in downtown Auckland. It would replace an inadequate existing bus terminal and a poorly located railway station. A designation, approved following full process (including appeals) for the transport and parking centre would be able to be implemented. The Britomart block would be revitalised and important planning objectives for the harbour edge achieved.

103. The BOMA group submitted that in this case 'the benefit issue' concerns whether or not the underground structure should be constructed in such a way that saves cost through not having to be sealed, rather than using conventional techniques with less risk.

104. The appellants maintained that submissions and evidence tending to suggest that the transport and parking centre would not be in the public interest should not be taken into account in deciding these appeals. They contended that the relevant considerations are those arising from the specific activities sought to be authorised by the resource consent applications.

105. We hold that in these proceedings it would not be appropriate for the Court to consider the opponents' challenges to the concept of the transport and parking centre. It follows that we should not make any finding on the claimed public benefits of it. For the present purpose it suffices that the transport and parking centre is designated on the district plan, and that granting the consents sought would enable one design for that centre to be implemented.

106. We have to consider on its merits the proposal that was presented by the City Council, and the actual and potential effects on the environment of allowing that proposal. Comparison with effects of a hypothetical design, involving a fully sealed underground structure, is not necessary to enable us to decide these appeals<sup>40</sup>.

### Private nuisance

107. We refer to BOMA group's case to the effect that a consent authority could not by a resource consent grant a licence to cause physical damage which would be against the law of private nuisance. If that was intended to imply that a grant of resource consent would not relieve the consent-holder of any liability in private nuisance arising from exercise of the consent, that may well be so (and the City Council did not contend otherwise). However we do not consider that the question whether potential effects of the proposed excavation, or the taking and diverting of groundwater, would constitute an actionable private nuisance is within the proper scope of these proceedings.

108. The duty of a consent authority considering a resource consent application under the Resource Management Act is to have regard to any actual or potential effects on the environment of allowing the activity, and to any relevant planning instruments, and to decide the application for the purpose of promoting the sustainable management of natural and physical resources, as defined. That is a public law function. A consent authority, or the Environment Court on appeal, is not required to, and has no authority to, make any decision whether, as a matter of private law, any such effect might also be actionable as a private nuisance, or any other tort.

109. Accordingly we decline to consider, and decline to make any finding, on whether any effects of the proposed excavation, and taking and diversion of groundwater, would be actionable as a private nuisance.

### Western extension of Quay Street underpass

110. We now refer to Mr McRae's submission, based on section 91 of the Resource Management Act, that the western extension to Lower Hobson Street of the lowering of the Quay Street carriageway should be considered with the proposal before the Court.

111. Section 91(1) of the Act reads –

- (1) A consent authority may determine not to proceed with the notification or hearing of

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<sup>39</sup> Environment Court Decision A101/97.

<sup>40</sup> Cf *Cullen v Kaipara District Council and Trail* Environment Court Decision A15/99.

an application for a resource consent if it considers on reasonable grounds that -

- (a) Other resource consents under this Act will also be required in respect of the proposal to which the application relates; and
- (b) It is appropriate, for the purpose of better understanding the nature of the proposal, that applications for any one or more of those other resource consents be made before proceeding further.

112. The City Council reminded us that in the interlocutory decision given in these proceedings on 25 August 1997<sup>41</sup>, the Court had directed that any party who wished to assert that any further resource consent would be needed was to commence proceedings by 15 September 1997 in which that assertion could be determined. Some parties (but not Mr McRae) had made an interlocutory application alleging that further resource consent were needed; and that application was withdrawn on 28 October 1997. Prehearing directions such as that given on 25 August 1997 are made in the hope of assisting the parties to prepare for a substantive hearing which is efficient and fair. Mr McRae did not take the opportunity then given to raise within the period set the resource consents that may be required for the western extension of the lowering of the Quay Street carriageway. It would not be efficient or fair to consider his submission to that effect raised only at the substantive hearing.

113. In any event we remain of the understanding which we stated in *Royal Forest and Bird Protection Society v Manawatu-Wanganui Regional Council*<sup>42</sup> that each resource consent application has to be considered within the scope of what is sought by it; and in *Cayford v Waikato Regional Council*<sup>43</sup>—

... that regard is to be had to direct effects of exercising the resource consent which are inevitable or reasonably foreseeable, and also to effects of other activities that would inevitably follow from the granting of the consent, but that regard is not to be had to effects which are independent of the activity authorised by the resource consent.

114. We accept the City Council's position that the proposal presently before the Court is all that is necessary to enable the proposed transport and parking centre to function. Separate applications have been made for the western extension. We do not consider that for the better understanding of the nature of the present proposal, we need to hear evidence about that. The western extension would not inevitably follow from the granting of the consents

sought by the applications the subject of these appeals: that extension is independent of the excavation and groundwater diversion that would be authorised by those consents. Mr McRae's argument on this point is rejected.

### Boundaries of designation

115. We refer next to Mr McRae's submission that the Court cannot decide the present appeals until the designated site has been defined in the proposed district plan. We accept Mr Cooper's reply that, if there are discrepancies in the boundaries of the designated site, that is a matter to be considered on his submission on the proposed district plan. It is not capable of bearing on whether resource consent should be granted for the earthworks or the groundwater diversion. We do not accept Mr McRae's contention on this point.

### Deficiencies in drawings

116. We are not persuaded that Mr McRae's contention that the drawings do not show how the perimeter wall to Customs Street would not be deformed has anything to do with whether resource consent should be granted or refused for the proposed earthworks and resulting groundwater diversion. The structural integrity of the building is more properly a matter for consideration on the building consent application, a process which is to be overseen by the audit panel of independent experts. In any event the appellants' witness Mr Boardman refuted Mr McRae's contention in cross-examination.

117. Our attitude to Mr McRae's objection about the mezzanine floor is similar.

118. We understand Mr McRae's wish to uphold good drawing office practice. However we do not consider that it is part of the Environment Court's role to do so. We decline to make findings on the points made by Mr McRae in that regard.

### Urban design

119. Although he did not make any submission on the topic when addressing the Court on his case, Mr McRae called as an expert witness an architect with a specialist qualification in urban design, Associate Professor C A Bird. That witness testified to opinions which were critical of design elements of the western portal to the Quay Street underpass. No doubt in response to notice of that evidence, the City Council called Mr R J Pryor. In his reply, Mr Cooper raised the relevance of that issue.

41 Decision A101/97.

42 [1996] NZRMA 241, 263.

43 Environment Court Decision A127/98.

120. Plainly the design of those elements is beyond the matters to be considered in respect of the earthworks. In our view the design of the western portal is too remote to be considered on the diversion of groundwater too. In any event the design of those street works might be changed without requiring resource consent.

121. We find that the claimed adverse visual effects of the design of those elements would not inevitably follow from granting consent for the proposed earthworks and groundwater diversion, and that they are independent from those activities. They are not within the matters to which the Regional Council has restricted the exercise of its discretion for deciding the earthworks application. We therefore reject the issue as irrelevant, and decline to make findings on the point in these appeals.

### **Climate change and other contingencies**

122. The climate change and other contingencies raised by Mrs Hicks and Mr Jones reflected the experience and interests of those submitters. Their claims are capable of being relevant to this groundwater diversion proposal only to the extent that the bases for groundwater modelling have been properly prepared having regard to such contingencies. In that respect we make our findings later in this decision.

123. More generally those submitters raised concerns about the possible effects on the harbour edge of tsunamis or storm surges coinciding with spring tides, especially with continuing rises in sea level. In those more general respects we hold that they are too remote from the proposed earthworks and resulting groundwater diversion to be relevant to the decision on these appeals.

### **Railway tunnel excavation effects**

124. It was part of Mr Floyd's case that the Tranz Rail proposal for excavation of the railway tunnel made inadequate provision for protection of the surrounding environment by hay bales, bunds, sediment controls, and wheel-washes.

125. It is to be remembered that resource consent is not required for the excavation of the tunnel, only for the resulting groundwater diversion during excavation. We hold that Mr Floyd's concerns arise from the excavation, not from the groundwater diversion, and that they are not relevant to the proceedings before the Court.

126. Despite that, Tranz Rail has agreed to the imposition of additional conditions sought by Mr Floyd. The respondent made no issue over the imposition of those conditions. In the event of consent being granted, those conditions should allay Mr Floyd's concern in those respects.

### **Effects on retail businesses**

127. A Adcock and others raised disruption to their retail businesses due to diversion of bus and general traffic, loss of kerbside car parking spaces, and resulting traffic congestion, during construction of the transport and parking centre, and the associated lowering of the Quay Street carriageway.

128. There may very well be adverse effects on businesses in the vicinity of the Britomart project and they may in some cases cause individual losses worthy of compensation. That is beyond the proper scope of these proceedings. Any such effects would not be within the matters to which the Regional Council has restricted the exercise of its discretion on the earthworks consent. They would not arise from the exercise of the groundwater taking and diversion consent sought. We hold that they are not within the compass of these proceedings, and we decline to make any findings on them.

### **EFFECTS ON THE ENVIRONMENT**

129. In respect of the water permits, there being no conflict with Part II of the Act, the Court is required to have regard to the actual and potential effects on the environment of allowing the activities. There was much contention about the effects on the stability of land and buildings of the diversion of groundwater for the transport and parking centre.

### **Diverting and damming groundwater flows**

130. As Auckland expanded in the late 19th and early 20th centuries, the edge of the Waitemata Harbour near the central business district was progressively reclaimed to provide flat land and port facilities. The original shoreline at the base of the Shortland Street cliffs was located near the present Fort Street. Remnants of Waitemata Group coastal cliffs are present behind the buildings on the south side of Fort Street, where the ground rises steeply to Shortland Street. At that time Point Britomart, an outcropping ridge of Waitemata group rock, stood approximately 180 metres north of Anzac Avenue.

131. Point Britomart was excavated down to present ground level to provide for better access to the eastern bays and to produce fill for the reclamation. Fill was also obtained by dredging the harbour and the dumping of demolition debris and other random material. These materials are expected to be found within the fill that directly underlies the surface of the transport centre site.

132. The site is located a little to the eastern side of the outlet to the Queen Street stream valley. The western section of the transport centre site is over the buried valley where the depth to the unweathered Waitemata Group rock



is greatest. The valley has been infilled with Tauranga Group material, which is also at its greatest depth here. The level of the unweathered Waitemata Group rises on both the eastern and western flanks of the valley. At the eastern edge of the transport centre site (in the location of the former Point Britomart) the Waitemata Group rock is virtually at the ground surface. To the west, the level of the rock rises steadily towards Albert Street. The thickness of the Tauranga Group soil also decreases away from the centre of the old valley.

133. The hydrogeology of the central business district reflects the topography of the area. The Queen Street valley runs approximately south to north and is enclosed by the Waitemata Group ridges to the west, south and east (those beneath Hobson Street, Karangahape Road and Symonds Street respectively). These ridges define the catchment area and the approximate boundaries of the groundwater table. The groundwater tends to flow in a south to north direction, following the fall in the topography of the catchment, finally seeping in to the harbour and discharging at the base of the pre-existing gullies. The harbour provides a constant head boundary to the groundwater regime at mean sea level.

134. Evidence on behalf of the appellants was given by Mr A D Pattle, a professional engineer specialising in groundwater flow and a director of a consulting firm which specialises in water resource engineering. This witness has had wide experience in assessing the effects on groundwater levels for many construction projects, both in New Zealand and overseas. Under his direction his firm had carried out an independent hydrogeological investigation of the transport centre site to develop predictions of groundwater drawdown effects using a mathematical groundwater flow model. The model incorporated all of the salient features of the groundwater system which are likely to control the magnitude and extent of drawdowns associated with the excavation. The results of that investigation were given in technical data produced to the Court.

135. Groundwaters encountered at the excavation site will be derived from the upstream catchment area of the site. That catchment is a steep-sided gully formerly occupied by a northerly flowing stream which is now routed through the stormwater drains.

136. It has been necessary to take into account the highly modified nature of the physical environment. The hydrology of the central business district catchment has been significantly altered by the development of the city, and most of the land is now impermeable, being covered with buildings and paved areas. The natural surface water drainage pattern, and infiltration processes which recharge the groundwater, have therefore been significantly disrupted.

137. The investigation found evidence, from borehole data, pumping test results and the nature of the geological units, that both shallow and deep groundwater flows are present in the vicinity of the site. A regional groundwater level is contained within the Waitemata Group rock which defines the upper level for fully saturated strata in the catchment. Below the ridges in the upper part of the catchment a series of perched aquifers lie above the regional water level within the Waitemata Group, these being controlled by the occurrence of low-permeability mudstone beds.

138. In the lower catchment area around the excavation site, the silt- and clay-rich Lower Tauranga Group and the weathered Waitemata Group soils represent a significantly lower permeability horizon which restricts the vertical flow of water. Above these are Upper Tauranga and Fill units with highly variable water-bearing properties and permeabilities supporting a shallow groundwater system. Further up the catchment, the Albert Park volcanics also represent a shallow groundwater system moulded above the Waitemata Group.

139. The groundwater flow within the deep, regional Waitemata Group aquifer is to the north towards the coast. Groundwater levels in this aquifer rise from approximately mean sea level (RL 0 metres) at the coast to RL 6 metres in the centre of the catchment.

140. In the shallow groundwater system within the Tauranga Group and Fill, there is also a very gentle water table gradient to the coast. The water table within this system rises only to about RL 2 metres along Fort Street and lies 2-3 metres below ground level.

141. Groundwater also moves vertically between and within the different hydrogeological units, although the high degree of layering and the presence of low permeability beds means that vertical flow is extremely slow. In the upper catchment area the movement of water is downward from recharge sources at the surface. This downwards percolating water within the Waitemata Group is intercepted by successive perched aquifers, although a proportion reaches the deep regional water table.

142. The groundwater pressures measured in the deep Waitemata Group around the foreshore area are higher than the groundwater levels measured in the Fill. Therefore around the excavation site the vertical flow directions are reversed, and there is upward leakage from the Waitemata Group into the overlying Tauranga Group and Fill and into the harbour. This trend would be reversed around the excavation after it is constructed, as groundwater is drawn into its base.

143. The shallow groundwater environment within the Fill and Upper Tauranga Group is highly dynamic and

complex. It exhibits tidal effects for more than 200 metres from the coast, which indicates that it is strongly controlled by drainage and recharge effects of the municipal stormwater drains. Together with other service trenches at or below the water table, these lines form rapid flow conduits for groundwater movement, and represent linear sources of existing recharge and discharge. The presence of the services enhances the average permeability of the Fill when the unit is considered as a whole.

144. The Albert Park volcanics contain a highly localised perched aquifer which is connected to the Fill/Upper Tauranga and underlying Waitemata Group groundwater systems. Monitoring data indicate relatively stable groundwater levels at about RL 5.3 metres. Vertical leakage into the Waitemata Group and lateral leakage through the lava flow and into adjoining Fill in the Queen Street Valley is considered likely.

#### *Hydraulic properties*

145. Predictive analysis of the groundwater environment in terms of its response to the excavation requires that the hydraulic properties of the principal hydrogeological units are confidently established. The most important properties to be quantified are horizontal and vertical permeabilities.

146. Several techniques have been employed to assess these parameters, involving tests within boreholes on site and tests carried out on samples in the laboratory. More than 40 rising and falling head piezometer tests, which targeted specific aquifer units, had been carried out around the site by the project engineers.

147. In addition to these tests, large-scale pumping tests were carried out within the Waitemata Group. These tests provide more representative bulk values for permeability, as well as information concerning the vertical permeabilities of overlying formations. This data was particularly useful in confirming the anisotropy in the Waitemata Group and the low vertical permeability of the Lower Tauranga Group.

148. Laboratory tests were also conducted on core samples taken from site investigation boreholes. Those tests were able to measure the vertical permeability of the different units. However, given the high degree of heterogeneity, or vertical variation in sediment texture, they could only be used as an approximate guide. Other supporting evidence was used to evaluate vertical permeability, including pumping test data, lithological and textural characteristics, and vertical hydraulic head distributions.

149. Prediction of the behaviour of the groundwater system in the lower central business district catchment in response to the proposed excavation involved analysing the complex hydrogeological environment previously described, and the large amount of factual data collected.

The most suitable and effective technique available for that analysis was a mathematical groundwater model.

150. The mathematical model represents a close approximation to the actual groundwater environment within which the configuration and properties of the hydrogeological units are represented, together with external stresses such as recharge and pumping. The model simulates groundwater flow indirectly by using equations which represent the physical processes that occur in the system. The computer code used is Modflow, developed by the United States Geological Survey, and which has been comprehensively verified.

151. The effectiveness of any groundwater model is dependent upon the quality of the data used to construct and calibrate it. Mr Pattle deposed that he was confident that the characteristics of the groundwater environment relevant to the proposed development met the criteria required for the effective use of the model. He was of the opinion that the three-dimensional model he had constructed was justified due to the scale of the proposed excavation within the wider groundwater catchment. The model boundaries have therefore incorporated a large part of the central business district catchment so that regional influences can be accounted for.

152. Following construction of the model, comparisons were made between the water levels and the simulated flow quantities, and the observed water levels in conjunction with the independently calculated water balance. A close agreement was reached, which led the witness to the conclusion that the model reliably represents the behaviour of the natural groundwater environment.

153. Further testing of the model was also done to further improve confidence in its reliability. This involved a sensitivity analysis by which the calibrated values for permeability, recharge and boundary conditions were systematically changed within the ranges of these parameters measured in the field or assessed by independent calculations. The amount of change in the water pressures that the changed values cause is a measure of the sensitivity of the model to that particular parameter.

154. Under steady-state flow in current groundwater conditions (without the proposed excavation), the most sensitive model parameter was found to be the horizontal permeability of the Waitemata Group. This parameter has been particularly well characterised through the pumping tests.

155. The model is insensitive to variations in permeability of the other formations, to recharge and to conditions on boundaries. In future if pumping occurs from the excavation, the vertical permeabilities of the Waitemata Group and the Lower Tauranga Group would become important parameters due to the imposition of vertical flows. The pumping tests, which partly simulated the future

pumping from the site, yielded parameter values consistent with those used in the model from a number of different boreholes.

156. Mr Pattle also described how the model was adjusted in response to further geological information from ongoing investigations. The changes were few and did not affect the basic hydrogeological parameters used to construct the model. However they included an adjustment to the number of layers in the model. These changes involved rearrangement of the numerical layers that the model uses to represent the hydrogeological conditions. Layers were repositioned to better coincide with the updated stratigraphy from the additional field investigations. Additional layers were inserted to more closely represent the slope of the Quay Street underpass as it would rise to exit next to Queen Elizabeth Square. The stratigraphically driven alterations improved the numerical efficiency of the model but had little effect on its accuracy.

157. Commenting on the suggestions about the effect of predicted rises in sea-level, the witness explained that the purpose for which modelling had been done was to determine the effects on groundwater levels that would be brought about by the construction of the proposed transport centre. Those effects would fully manifest themselves within 10 years of the start of construction, which is a relatively short period within the context of sea-level rise. Sea-level rise due to climate change would have no effect on the validity of the model predictions.

158. Mr Pattle deposed that there was no reason, even after all the additional work and model sensitivity analysis, for him to change his opinion that the investigation of the groundwater system in the downtown area for the transport centre project has been appropriately very intensive and thorough. The additional work had led to reductions in the predicted groundwater drawdowns, and the modifications made to the transport centre design had also made a significant reduction, especially in the critical areas of Queen's Arcade, Customs Street and Edean's Building.

159. Both Mr Pattle and Dr D V Toan (a consulting geotechnical engineer with considerable experience of central Auckland) were of the opinion that it was likely that the fill had been in a drained state at some time in its history, before the extension by further filling and the intensive development of the area with the addition of piped municipal water supply and drainage. Mr Pattle considered that if the fill is again drained to sea-level, the effects would be minor.

160. The BOMA group contended the secant-pile wall would have a damming effect on the natural groundwater, and would cause a rise in groundwater levels. The model shows that there would be a small rise, although in practice this rise would be controlled by the extensive network of drains and other service trenches within the Fill.

## Groundwater drawdowns

161. The proposed transport and parking centre would require short- and long-term diversion of groundwater to maintain drained conditions below the basement floor slab. That diversion would result in some lowering of groundwater pressures in the vicinity, which may in turn result in the consolidation of softer, near-surface sediments adjacent to the site. The potential effects of ground settlement to buildings and services in the area surrounding the site is therefore an important issue.

162. The quantification of groundwater drawdowns which would develop around the transport and parking centre is fundamental to the assessment of ground settlement effects.

163. Mr Pattle had made predictions of these drawdowns, using the mathematical model referred to earlier and incorporating the most recent site data, and his experience in the Auckland area. His assessment of the long-term effects was that the groundwater pressures in the soils around the site would be reduced for a distance of up to 150 metres from the perimeter retaining wall. The Waitemata Group rocks would experience a drop in water pressure of up to 12 metres, and the Tauranga Group a reduction of up to 1.5 metres. On the eastern side of the excavation, where the Tauranga Group and Fill sediments are thin, the water table would be lowered below the base of these materials and into the underlying Waitemata Group.

164. The original model predictions can be summarised as follows:

- (a) Ninety percent of steady stream drawdown would be reached after approximately 3-5 years.
- (b) Excavation inflows are expected to be in the order of 2 litres per second.
- (c) Maximum steady-state drawdowns at the base of the upper Tauranga Group (unit 1) are predicted to be approximately 2.5 metres.
- (d) Drawdown effects in the Fill and upper Tauranga would extend to some 150 metres south of the excavation site.
- (e) At the base of the lower Tauranga Group, revised maximum expected drawdowns would be about 1.5 metres.
- (f) Drawdowns in all units on the western side of the site would be less than that.
- (g) On the eastern side of the site where the secant wall extends only to level B2, the water table would be drawn down towards the base of the excavation within the Waitemata Group.
- (h) The proposed granular backfill in the stormwater trench around the perimeter of the site would assist in reducing drawdown effects in the Fill.

165. Drawdown responses in most aquifer systems are sensitive to the amount of water entering them, or the recharge. Therefore quantification of recharge in both shallow and deep groundwater flows was a necessary component of the analysis.

166. Sources of recharge to both the shallow and deep regional groundwater environment systems were identified as follows:

- direct infiltration of rainfall to the shallow groundwater environment in parkland and other open space.
- leakage from stormwater drains.
- leakage from sewers.
- leakage from the water supply system.
- tidal recharge along service conduits.
- deep infiltration to the regional Waitemata aquifer via leakage from overlying areas.

167. Borehole monitoring data, aquifer flow-through calculations, other studies on this aquifer, and service leakage estimates were used to estimate the quantity of recharge into the catchment. After the application of all the most up-to-date information, and proposed modification to the building structure, the shape of the drawdown contour plot illustrated two key factors. The first was that the predicted drawdowns from the modified structure would increase in an easterly direction where the perimeter wall would not be sealed. The second factor was that the model predicted a slight rise of up to 0.3 metres in groundwater levels to the immediate south and west of the transport centre site. These groundwater level changes are within the normal fluctuations caused by tidal and climatic influences. Mr Pattle deposed that he did not expect that there would be any significant rise in practice, as the service trenches beneath the streets carrying power, sewers and water, would control the shallow groundwater levels through drainage along them.

168. With the application of this new data Mr Pattle concluded that at the eastern end of the proposed building drawdowns would remain unchanged. Drawdowns in the upper Tauranga/Fill Groups near Customs Street would be less than zero (a small rise) but would increase to the south. This trend is partly a result of the blocking effect of the sealed building structure on the natural flow of groundwater.

169. Mr Pattle stated that in the area to the west of Fort Lane the groundwater drawdown effects in the materials above the lower Tauranga Group were expected to be contained within normal natural groundwater fluctuations. He considered it unlikely that the drawdown effects from

the transport centre would be readily evident from ongoing monitoring data.

170. The principal issue raised by opponents concerned the effects of water drawdown arising from the construction of the perimeter wall and excavation of the proposed transport centre site. Their focus was a comparatively narrow one, because they conceded that the long-term effects were of no concern. Their expert witness, Mr P B Riley (a consulting geotechnical and water resource engineer) said in his evidence:

The reduction in the depth of the excavation at the western end of the site combined with the sealed floor slabs and extension of the sealed secant wall, significantly reduces the steady state or long term drawdown effects outside the excavation. Within the bounds of accuracy of the groundwater and settlement predictions, the drawdown induced settlements outside the excavation are unlikely to be of sufficient magnitude to cause damage to existing structures.

171. So the issue was the effects of drawdowns during construction of the transport and parking centre. Within the construction phase, the focus of contention was largely limited to the period immediately prior to the sealing of the basement floor slabs and the B5 level.

172. The issue was also limited in area. The sealed section of the B5 slab would extend for 50 metres (east to west) parallel to Customs Street and Union House (the area marked “B5 slab with uplift constraints” on Exhibit 12). That part of the site and the area to the west of it, where the excavation has been reduced in depth to level B2, is the area in proximity to the Queen Street valley which has been “infilled with weaker soils of the UTG”<sup>44</sup>. It is at this western end of the site that Mr Riley deposed that he had calculated the highest settlements for drawdowns. In cross-examination he agreed that the eastern end of the site was not of sufficient concern for him to have modelled drawdowns there. He had concentrated on the areas to the west of the deepened section of the wall.

#### **Effects on adjoining buildings**

173. The construction of the transport centre proposal would have the potential to cause settlement of the ground surrounding the site with consequent damage to buildings both directly adjoining the site and beyond. That potential would arise from two separate causes: first, from changes in water pressure in the surrounding soil causing ground settlement; and secondly, from deflection of the perimeter retaining wall which would be supporting ground material and water on the perimeter of the excavation. Adverse

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<sup>44</sup> This is illustrated on the Technical Data Supplement (exhibit 4), section Q7A.

effects caused by ground settlement on directly adjoining buildings could arise from both causes, but unless the wall deflections are substantial, it is more likely that buildings more distant from the site would be susceptible only to settlement from water pressure changes.

174. There are a number of heritage buildings within the site which are proposed to be retained as facades or as entire buildings. The structural integrity of these buildings is to be maintained while excavation takes place below them.

175. Three buildings directly adjoin the site: the Novotel Hotel at the corner of Customs Street and Queen Elizabeth Square, the apartment building at 148 Quay Street, and Union House at 136 Quay Street. Two others front the Quay Street underpass and closely adjoin the main site: Endeans Building on the corner of Queen Elizabeth Square, and Harbour View at 152 Quay Street. These are the five buildings potentially at risk from both causes of movement described above, and we consider them first.

176. In the modified proposal now before the Court, the depth of the transport centre adjoining the four western-most of these buildings would be restricted to the B2 level, and the floor would be designed to resist hydrostatic uplift. The B5 floor slab up to the eastern end of Union House is to be a sealed construction with uplift restraints against hydrostatic pressure. A transverse wall between the B2 and the B5 construction is to be of 1200-millimetre secant piles extended to 4 metres below the B5 slab. On the Customs Street boundary of the site, the perimeter retaining wall is to be deepened and extended eastwards a further 125 metres to ensure the entire basement is either sealed or entirely embedded in the unweathered Waitemata group rock. In addition, various systems of anchors and cross ties are proposed relative to the five adjoining buildings to limit any deflection effects.

177. As a result of these structural modifications, internal structural methods to be adopted, and the conditions proposed to attach to any consent, Mr P J Millar (a consultant geotechnical engineer called on behalf of the appellants) gave this evidence about effects arising from perimeter retaining wall deflection:

Analysis of potential wall induced ground settlements have been undertaken for the wall sections around the site. The effects are limited to areas close to the wall and do not extend to buildings more than about 15 metres from the wall. Therefore there will be no effect arising from wall induced settlements on the buildings on the southern side of Customs St, nor the buildings on the western side of Queen Elizabeth Square. Similarly no buildings on the northern side of Quay St will be affected by the works.

178. Dr P R Goldsmith is a consulting engineer specialising in geotechnical and foundation engineering. He had been engaged by the Regional Council to make an

independent assessment of possible settlement effects of the groundwater diversion and taking. In considering settlements possible from the same cause, he concluded:

... ground movement would be unlikely to occur beyond a horizontal distance of approximately 12 metres behind the perimeter retaining wall of the proposed modified Britomart structure. ... In my opinion it is unlikely that wall deflection will result in significant additional ground settlements of buildings to the south side of Customs Street.

179. Mr BJB Brown (a consulting structural engineer engaged by the Regional Council), relying on that advice, was satisfied:

... that any local settlement effects over time arising from horizontal movements in the perimeter wall of the Britomart basement construction are likely to be negligible in terms of my consideration of effects on the adjacent buildings within the subject area.

180. We found the evidence of those witnesses persuasive, and we find that only immediately adjacent buildings may be affected by perimeter wall movement.

181. Mr M J Bloxham (a consulting structural engineer engaged by the Regional Council) had considered the effects that ground movement due to perimeter wall deflection and any changes in groundwater level may have on the foundations of buildings immediately adjacent to the site. All five of these buildings are based on foundation piles. The Novotel, and the buildings at 148 and 152 Quay Street, have bored concrete piles with less resistance to transverse loading, and are susceptible to shear failure. The supporting piles for Union House are of reinforced concrete isolated within steel liners to resist earthquake loadings, and Endeans Building is based on wooden piles, presumably driven to the top of the unweathered Waitemata rock. The witness considered that neither of these buildings was so susceptible to those effects.

182. Mr Bloxham deposed by way of example that as an absolute maximum the deflection which could be considered acceptable for the eastern piles of the Novotel building is 8 millimetres, and for 148 Quay Street is 20 millimetres. He noted that analysis by the applicants' advisers had indicated that deflection of such piles directly outside the perimeter wall would be very similar in value to deflections of the wall itself.

183. Mr P R Boardman (a consulting structural engineer engaged by the appellants) reviewed the likely effects on those five buildings as indicated in the evidence presented by Mr Millar which had been adjusted to reflect the modified proposal and associated conditions now before the Court. He considered that the maximum deflections to which adjacent foundation piles may be subject as a result of retaining wall deflection would be: Novotel north side

3.5 millimetres, east side 8 millimetres; Endeans Building 3 millimetres; Harbour View 3 millimetres; and for 148 Quay Street and Union House the perimeter wall deflection was calculated to be 20 millimetres. Mr Boardman gave the opinion that those levels of deflection respectively would not cause damage to the building piles.

184. Mr Bloxham had also taken account of the possibility of settlement due to dewatering which may cause the supporting soil to drag down on and reduce the bearing capacity of the building piles. It was his evidence that now the western end of the proposal is restricted to the B2 level, any effects on the bearing capacity of piles would be minimal. The exception to that was Union House, where the eastern wall would adjoin the B5 level. For that location, potential wall deflections had been limited to 10 millimetres adjacent to the pile bases by provision for ground anchors next to the piles. The witness was satisfied that if necessary to meet the standards set, there are further construction measures available. Mr Bloxham concluded that the proposal now before the Court, coupled with the special conditions of permit now proposed,—

... when designed, constructed and monitored appropriately should have acceptable low adverse effects on the adjoining buildings.

185. In the light of Mr Riley's evidence previously quoted, in respect of the five adjacent buildings, we were presented with no evidence from a qualified witness to lead us to doubt Mr Bloxham's assessment, and we accept it.

### **Settlement beyond adjoining buildings**

186. The potential for damage to buildings to the south of Customs Street would arise from alterations to groundwater conditions. Buildings within the block bounded by Customs, Fort, Queen and Gore Streets, and that by Queen, Fort and Shortland Streets and Jean Batten Place, were considered.

187. Mr Boardman outlined the studies undertaken by his firm of all buildings in the subject area. A comprehensive report was produced<sup>45</sup>, which summarised for all existing buildings which might be affected by the proposed construction relevant information on the construction and foundation type, geological information, visual survey information and the potential consequences of ground settlement as could be best ascertained from available information. Mr Boardman updated the information to accord with the modified structure.

188. The witness explained that an existing building, depending upon its foundation conditions, may be subject to direct settlement where the whole building settles more

or less uniformly, by the same amount at each of the load-bearing components. Further, differential settlement could occur where the foundations settle by different amounts, leading to racking or twisting of the building. Even unreinforced masonry buildings may settle uniformly by up to 20 millimetres with only very slight damage, a situation which commonly occurs over time due to natural settlement of the ground. Mr Boardman deposed that uniform differential settlement up to 1:1000 is generally accepted as not causing damage to masonry buildings.

189. Within the subject area there are a variety of subsoil and groundwater conditions. Each of the buildings was identified in the report as to age, storeys and basements, structural type and condition, foundation type, and condition of floor slab at street level. The report gave a maximum calculated settlement at each of the foundation, lowest floor and street levels, and assessed the consequence in each case as being nil, negligible or very slight under each of the headings: structure, lowest floor and services. In respect of this latter heading five buildings were noted where services may need to be relocated at the point of entry. These damage categories were assessed relative to predicted differential slope settlement and total building settlement. The results of his firm's survey led Mr Boardman to conclude "The proposal can be constructed with acceptable environmental outcomes."

190. Dr Goldsmith had undertaken an independent assessment of likely settlement effects on existing buildings in the subject area as a result of groundwater alterations. He had given careful consideration to all the background factors influencing the subject area, and all the available information bearing on settlement. As assumptions had to be made, he followed a conservative approach to the appraisal.

191. Dr Goldsmith had constructed "likely" drawdown contours from Mr Pattle's groundwater model predictions, and "worst case" contours where the Waitemata group bedrock vertical permeability was assessed to be twice the figure used in the former prediction. This latter was considered by Mr A G Smaill (a hydrogeologist employed by the Regional Council) to represent a "reasonable worst case scenario", reflecting a conservative approach.

192. Predicted maximum values for each building were calculated for inferred settlement values and inferred angular distortion values for both "likely" and "worst case" drawdowns. These were tabulated and presented by Dr Goldsmith in his evidence. In considering the need for a monitoring and contingency plan he gave the opinion there remains a risk that some surrounding buildings will be adversely effected by drawdown settlement. He defended the conservative approach adopted for two reasons. First, because of the uncertainty relating to variable strata

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<sup>45</sup> Technical Data Volume 5, produced as Exhibit 11.

thicknesses, soil compressibility and predicting actual water drawdown; and secondly, due to the high potential cost of any damage occurring.

193. Dr Goldsmith concluded that potential adverse effects from dewatering were likely to be greater than predicted by the applicant's witnesses, and that there remains a risk that one building, Achilles House in Customs Street, founded on shallow foundations, would be adversely effected by angular distortion. As well, in respect of buildings where the basement floor slab is not piled or suspended, the slab could be subject to cracking. He found however that the monitoring and contingency plan provided for in the proposed conditions would allow implementation of remedial measures to mitigate settlement-related damage in the event that potentially adverse settlements did occur.

194. Mr Brown had also conducted an independent review of the likely effects to buildings in the subject area. He adopted limits applied to brick masonry wall construction, as these impose the most stringent foundation settlement requirements. He expressed concern that as the differential settlement history throughout any particular building is not necessarily known, the effect of further imposed ground settlements should be treated with caution. In this regard he considered the risk category 1 "very slight" as the absolute upper limit which should apply to the project. He reviewed Dr Goldsmith's evidence having his own approach to the many reported factors which had influenced that evidence. He reached very similar results to those reported and a conclusion similar to that of Dr Goldsmith.

195. Only one owner of a building in the subject area presented any evidence: that was Mr J Olsen on behalf of Stamford House at 57-59 Customs Street. He explained that because underpinning of the building had been required during the construction of the adjacent Reserve Bank building, the foundations of Stamford House are now of unequal strength and the building is at greater risk of differential settlement. He spoke of significant damage which had resulted from the adjoining construction, and stated that the owners do not accept that Stamford House should be affected at all or even be at risk from the present proposal. Mr Olsen did not produce any evidence of a technical nature that the building would suffer any particular level of damage as a result of the proposal groundwater diversion.

196. In light of the statement by Mr Riley we have quoted above, we are left with two panels of highly qualified and experienced consultant technical witnesses for the appellants and the Regional Council, together with technical officers of both City Council and the Regional Council, all of the opinion that, while there can be no absolute guarantee of no damage to all buildings in the subject area, monitoring and contingency plans during and after construction would ensure that is the case. We have no technical evidence which would lead us to doubt that view.

197. In this regard we consider that the wording of Condition 2 relating to "no damage to building surrounding the site" would be an appropriate starting point, given that detailed design of the project is still to be commenced, and also that a detailed study of the current condition of buildings in the subject area has still to be undertaken. Such a study may well reveal existing degrees of damage which have arisen over time and which from case to case will determine what constitutes "no damage."

### **Failure mechanisms**

#### *Contingency plan*

198. The conditions proposed by the appellants and the respondent for the water permit for the transport centre, provide for a contingency plan. That plan would have to be prepared "before exercising this resource consent". Counsel for the BOMA group and others submitted that it is essential that the plan be approved by the Court, and submitted that by providing, in condition 10, that the plan be approved by the Manager, Environmental Management Department, Auckland Regional Council, and the Audit Group, "the parties are seeking to take from the Court one of its key functions - namely the consideration of the remedial and mitigation measures".

199. The appellants joined issue on that, and submitted that the conditions providing for subsequent preparation and approval of the plan by the respondent and the Audit Group are appropriate. Mr Cooper drew attention to the fact that condition 9 is specific as to the content of the plan, and to the fact that the provisions of condition 9 are augmented by other conditions of consent.

200. Counsel submitted:

- (a) In condition 20 on page 9 of the proposed conditions, there is mention of the monitoring and contingency plan as a matter to be reviewed and approved by the Audit Group. Such approval would clearly follow the "detailed design... of the project in accordance with the design concept as presented to the Environment Court" (condition 17); installation, six months prior to the exercise of the consent, of the "monitoring network consisting of piezometers, extensometers and settlement monitoring points required in Special Condition 23" (condition 24); ascertainment of the exact monitoring locations and the exact depths to be monitored for groundwater pressure (condition 27).
- (b) Condition 25 requires details of monitoring procedures, personnel involved, record keeping and reporting procedures to be set out in the monitoring and contingency plan. Except to the extent that monitoring is already (extensively) dealt with in the proposed conditions, these are details which cannot be fixed at this stage.
- (c) Condition 27 requires final details of the exact

monitoring locations and the exact depths to be monitored for groundwater pressure required by condition 23(1) to be specified in the monitoring and contingency plan. As Mr Smaill says in his second statement, at paragraph 5, these are details which cannot sensibly be provided at this stage, together with the other matters to which he refers. Condition 29(ii), in relation to exceedance levels not shown on Table 1, also requires the levels to be set by the Audit Group from the maximum drawdowns predicted in the groundwater model and for these then to be listed in the monitoring and contingency plan. This is another matter which cannot sensibly be dealt with at this stage, because condition 29(v) requires the groundwater model to be updated, with the approval of the Audit Group, to “reflect the detailed design of the structure and any recalibrations necessary based on any new groundwater level.”

- (d) Condition 23(iv)(c) requires the final location and number of building monitoring points to take into account the building type and size, accessibility to survey the points, and risk to damage from ground settlement and to be listed in the monitoring and contingency plan. This is a matter which must logically follow completion of the detailed structural condition survey required by condition 4.

201. Mr Cooper submitted that these were matters sensibly left to a later stage, and the independent judgment of the members of the Audit Group. At the same time however he urged that it should not be concluded that the proposed conditions do not contain sufficient detail in order for the Court to be certain that the consents may be safely granted subject to the conditions proposed. The key parameters delimiting effects are established by the detail of conditions 23, 28 with its establishment of building and ground settlement limits and trigger levels, Table 2 with its limits on horizontal wall deflections and pile deflections, Table 3 with pile capacities and Schedule 1 with its list of the buildings to be monitored, together with the detailed requirements as to retaining wall construction and monitoring set out in conditions 35 to 50. It was Dr Goldsmith’s evidence that the conditions proposed provided a means of monitoring ground water drawdowns and settlements, so that suitable mitigation measures can be implemented if required, in order to prevent adverse effects to the buildings.

202. Dr Goldsmith was questioned in relation to the monitoring and contingency plan, by Mr Bartlett, counsel for the BOMA group. The witness was asked about a contingency measure. He replied that the issue was part of the detailed design process, and indicated that the detailed design process and monitoring plan process are interrelated. His answer was similar to an earlier answer where he described the process to date and indicated that:

The next step in the process obviously is the detailed design which must include the construction phase of the building development to ensure that the consent conditions are complied with and in that context the consent conditions provide for an Audit Group to evaluate the performance aspects of the building concept and the physical performance during construction.

203. Dr Goldsmith gave replies to similar effect when cross-examined by Mr McRae when he said:

The practice of engineering is not a precise subject and this is why it is necessary to test what I referred to previously as the what if scenarios, that is the whole objective of the monitoring and contingency plan which is to test in a formal way or identify and test in a formal way the areas where there could be variation to ensure that the project and the design processes can properly accommodate those variations within the constraints particularly as far as my work is identifying the level of risk to buildings on the south side of Customs Street.”

204. Clearly, then, it was Dr Goldsmith’s opinion that the monitoring and contingency plan should be finalised at the detail design stage. Mr Cooper submitted that to require the Court to determine the details of the plan at this stage would be in a real sense to place the Court in the position of a building consent authority, which in his view would be inappropriate.

205. Counsel submitted that in relation to contingency measures, substantial evidence had been submitted to the Court which should enable the Court to conclude that there will be available contingency measures should any unpredicted event occur.

*Failure mechanisms raised by BOMA group*

206. Mr Riley, who was called on behalf of the BOMA group, attested that he had been able, using a two-dimensional groundwater model, to make an assessment for the modified structure of:

- (i) the likely settlements outside the excavation;
- (ii) the excavation stability during construction;
- (iii) perimeter wall deflections during construction;
- (iv) the mitigation measures that would be required during construction to maintain stability; and
- v) the effect the mitigation measures would have outside the excavation.

207. From his results he concluded that potential problems exist simultaneously with excessive drawdowns outside the excavation causing settlements, while on the inside of the excavation, the base would become unstable



if the pressure gradients become too high. To rectify one problem would generally make the other one worse.

208. He listed two possible failure mechanisms.

*Failure mechanism A*

209. If a layer of low permeability material restricts the vertical flow of water into the excavation (as Mr Riley considered likely), water uplift pressures could develop underneath the layer. If those pressures exceeded the weight of the soil mass above, the soil would fail or lift into the excavation. In soft low-cohesion soils, the soil would almost liquefy or fail by subsurface erosion.

210. Commonly such problems are mitigated by either partially backfilling with drainage materials to allow the high water-pressures to dissipate, or by drilling extraction wells to relieve the pressure below the excavation. Both of these alternatives would have the adverse effect of increasing groundwater drawdowns, and could also cause a reduction in support of the secant pile wall. High deflections of the wall would be a consequence.

*Failure mechanism B*

211. The excavation to B2 level would remain unsupported by the B5 slab for up to a month. Mr Riley considered that prior to the propping up of the secant wall with the B5 slab, the base of the excavation supporting the wall could become unstable. This type of failure would also be caused by high groundwater pressures around the base of the wall. The uplift pressures would effectively lift the rock mass. The additional load from the secant pile wall would cause the rock mass to fail into the excavation. Due to the loss of support at the toe, the wall would subsequently fail in bending. Again the risk of instability could be mitigated by using measures such as pressure-relief wells or possibly a grout curtain.

212. The consequences of wall failure could be severe. Mr Riley considered that the following effects are likely:

- Large scale failure of soil and rock into the excavation.
- Damage to surrounding buildings, roadways and services due to subsidence.
- Large settlements outside the excavation due to large groundwater drawdowns.
- Silt contamination of groundwater and surface water entering the excavation.

213. Mr Riley gave the opinion that the situation strains the limits of feasibility. Conservative assumptions for external settlement become non-conservative in respect of excavation stability, and he considered that a detailed assessment of the problem and the risks was essential. The witness maintained that instability is likely to occur within the base of the excavation. Instabilities are likely to be the

result of high groundwater pressure gradients around the toe of the wall. Instability of the excavation would remove support to the secant pile wall that might subsequently result in wall failure or excessive deflections.

214. Mr Riley's failure mechanism scenarios were addressed by several witnesses called by the appellant.

215. Mr Millar, referring to Mr Riley's mechanism A, observed that from calculations supplied by Mr Riley, what Mr Riley describes as 'failure' appears to comprise ground movement of less than 0.4 millimetres. Apart from considering any such movement to be minute, Mr Millar did not consider that it would occur. Mr Riley had also assumed the existence of a single very low-permeability layer close to the base of the B2 level; that the model used assumes the layer to be present and that it continues within the perimeter of the excavation, and yet does not continue anywhere outside the perimeter wall. Mr Millar gave the opinions that this would be a very unrealistic assumption, and that it is not supported by the geotechnical data for the project. In the unlikely event that such a single very low permeability layer occurs close to the base of the B2 level, and extends over a large area, it would have the effect of reducing groundwater pressure both inside and outside the site, and would actually reduce (rather than cause) the possibility of any failure from Mr Riley's failure mechanism A.

216. Nor did Mr Millar accept Mr Riley's failure mechanism B. Mr Millar deposed that the rock in the base of the excavation has adequate strength for the loading imposed on the wall without reliance on the B5 slab. The slab would provide additional support that is not necessary for the strength or stability of the wall.

217. Mr Millar also gave the opinion that failure from high groundwater pressures would also not occur. Principally this is because there would not be high groundwater pressures around the toe of the wall. The gradual and progressive excavation process (which will take at least one month) would result in progressive reduction of the groundwater pressures within the transport centre site. The witness considered that as a result there would be no high water pressures around the toe of the wall. Further, as the weight of excavation material would be gradually removed, the rock material below the B5 level would undergo elastic relaxation which would additionally reduce the groundwater pressures. As a result of these factors Mr Millar considered it not reasonable to predict high groundwater pressures around the toe of the wall as asserted by Mr Riley.

218. Nevertheless, as a conservative precautionary measure, shallow passive pressure relief wells have been incorporated in the design. Mr Riley had not taken them into account in his calculations but when they are included, as in Mr Millar's own analysis, the risk from instability from groundwater pressure is shown to be negligible. For

the same reasons he regarded Mr Riley's concerns about perimeter wall deflections as unfounded.

219. Mr Pattle had a two-fold response to Mr Riley's scenarios. First, he considered that the extensive geological and pumping test information from the site had been used to determine how well the Waitemata group can transmit pressures vertically. This characteristic had been incorporated into the groundwater model. Secondly, should a layer exist, as suggested by Mr Riley, the proposed groundwater monitoring programme would enable its early detection well before excavation reaches the lower levels. In that event, mitigation measures could be implemented, as necessary, well before the critical excavation level is reached.

220. In respect of Mr Riley's failure mechanism B, Mr Pattle said that the excavation of the B5 level would occur gradually from east to west, at a rate which would allow groundwater pressures to spread with the progress of the excavation. This would avoid the situation envisaged by Mr Riley.

221. Dr Toan had a similar view to Mr Pattle. He said that the two-dimensional model used by Mr Riley could not account for the effects of the horizontal drainage of the soil layers. As the excavation proceeds from east to west, the groundwater would drain horizontally out of the face. The horizontal permeabilities of the soils in the site are greater than the vertical, so Dr Toan considered that Mr Riley's model, which relies primarily on the vertical permeabilities to predict groundwater drawdowns, overestimates hydraulic gradients in the soil and rock within the excavation footprint. Dr Toan was also critical of the failure of Mr Riley's model to include the two-metre deep passive pressure relief wells that would be drilled below the base of the excavation. The witness considered that the use of those wells would remove the potential for 'excavation instability' to occur.

222. Dr Toan also deposed that, from his wide experience of deep excavations in Waitemata Group rock, the type of failure suggested by Mr Riley does not occur. His experience included the NZI carpark building, and the Sky Tower development, as well as numerous basement buildings in the Auckland area that had been excavated to similar depths without experiencing excavation instability.

223. Another geotechnical engineer, Dr B Simpson, in answer to questions by Mr Bartlett, made it clear that he did not accept that there was any potential for Mr Riley's scenario A to occur, even without the pressure relief wells. If it did occur, against his expectations, he saw no reason

to consider it a 'failure', as it would not involve a significant displacement of the retaining wall or overloading of the wall. In such an event he agreed that constructing pressure relief wells (as are currently included in the design) would be a sensible method to prevent the problem.

224. In re-examination Dr Simpson said that for a scenario such as suggested to occur a particular combination of properties would be necessary. There would have to be pressure in the water, so the ground must be sufficiently impermeable to hold it. Secondly, there would have to be velocity of water. There would have to be a sufficient quantity of water that it can lift the solid particles of ground, so this type of mechanism may occur in typically silty sands, but he did not believe it would occur in rock. In order to disrupt a body of rock, or a lump of rock, a very high water velocity is required, such as waves on a seashore in a storm.

225. Dr Simpson continued<sup>46</sup>:

The water is arriving in the basement at a speed, a velocity of 4 millimetres per day, this is an extremely low velocity, it cannot move even the smallest soil particle. So I believe the most that could happen is that water pressure could be trapped here, if the ground were of very low permeability, the pressure would build up, it might crack the rock but as soon as a crack appears the water pressure is released and there's no quantity of water, no velocity, no flow, to continue the damage. So I make two points. Firstly that the water cannot cause the ground to move upwards to a significant extent, and secondly, that even on this analysis there is no failure because the wall is not moving.

226. In summary, it was the evidence of the appellants' witnesses that the failure mechanisms would not occur.

227. Further, it was Dr Goldsmith's evidence, in cross-examination by counsel for BOMA and others, that failure mechanism B could be discounted on the basis of the greater depth of wall proposed, with the result that the flowpath would be longer, and there would be greater distance for the pressure to dissipate. Dr Goldsmith indicated that failure mechanism A would be avoided by means of pressure relief wells, or by undercutting and backfilling with drainage aggregate.

228. Another geotechnical engineer, Mr A H Nelson, concluded that 'mechanism A' was 'highly improbable at any stage' but deposed that there was a simple solution in any case. That would be to place a layer of hard fill approximately 0.5 metres deep and drain the base of the hardfill to a small sump. The hardfill was required anyway to provide access for construction equipment.

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<sup>46</sup> Notes of evidence, page 49.

229. Mechanism B, he said, could possibly occur in localised areas, but again there was simple solution. He recommended a simple rising-head test be undertaken after excavation of each secant pile and before filling the pile shaft with concrete. Any increase in flow would most likely be due to a fracture zone, and the base of the pile could be taken deeper or grouted as necessary.

230. Mr Bloxam also discounted mechanism A. His experience was that the presence of water in the soils within an excavated area has not had a great influence on retaining wall deflections and stability. This was because the negative effects on the soil strength tend to be offset by the water pressure at a significant height of the inside of the wall acting in the opposite direction to the pressure on the outside of the wall. He believed that the proposed conditions of consent would control the performance expected of the wall. If needed, any excess pressure could be alleviated by installing water pressure relief wells rather than the pumped extraction wells suggested by Mr Riley.

231. In summary, none of the Respondent's witnesses envisage any real difficulty in dealing with Mr Riley's failure mechanisms, should there be any appearance of the high water pressures on which they are based.

232. Having reviewed all the evidence on this topic, we find that the chance of either of the failure mechanisms occurring is very remote. We also find that the design allows for early detection of conditions in which either could occur, and methods of avoiding or mitigating any adverse effects.

### **Traffic**

233. Mr W R McDonald, a senior consultant traffic engineer, gave evidence on traffic issues restricted to the short term (that is construction period) effects, resulting from traffic diversion and street closures, and on matters relating to transportation and disposal of excavated material. He explained that this development may be only one of a number being undertaken in the general vicinity at any given time, so a comprehensive situation needs to be considered. His evidence covered road network capacities and additional traffic movements, access to and egress from the site during construction, impacts on adjacent activities and mitigation measures to minimise effects, the routes and methods available for material cartage, and the ability of the transport systems to cope safely.

234. Mr McDonald's evidence explained the traffic modelling undertaken, and the use of computer network models with the ability to simulate all vehicular traffic movements within the network, including the effects of traffic queuing at intersections. It was his evidence that a series of measures would make the partial closure of Customs Street and the full closure of Quay Street manageable during the construction phase. These measures included the removal of on-street parking, optimising of

signal settings, diversions of flows through other routes, and improving of cross-town traffic flows through Bowen Avenue and Churchill Street. The temporary loss of some 2400 parking spaces in the vicinity through loss of both dedicated parking facilities and on-street parking, and the relocation of bus services to adjacent streets would mean a reduction in the overall flow of traffic in streets adjacent to the transport centre.

235. Quay Street is a strategic route carrying 29,000 vehicles per day. Of the temporary closure of that road for some 18 months Mr McDonald said "Drivers will select alternative routes in response to the well advertised changes in the street network and there will be a re-balancing of traffic flows over the street network so that any delays are minimised." This assessment is representative of the general theme underlying the traffic management proposals as presented by this witness, one of analysis, maximisation of available resources, and public awareness programmes.

236. Transportation of excavation material would, following completion of the rail link tunnel, be largely by rail. It is intended that some 87% of the total would be handled in that way. Earlier in the programme, material is planned to go to existing fill sites at Rosedale, New Lynn and Puketutu. Mr McDonald was confident that roading access to these sites could be achieved with only very minor impacts on existing traffic patterns.

237. Mr D R Mander, Principal Transport Planner for the City Council, gave evidence of steps planned for the relocation of bus services and of pedestrian access to bus and other transport services. He advised that the City Council, as road controlling agency for the central area, had taken all necessary steps, including changes to bylaws, for the implementation of new bus stops and ancillary facilities.

238. Mr G J Tuohey, another senior consultant traffic engineer, who was called on behalf of the BOMA group, reviewed the evidence of Messrs McDonald and Mander. It was Mr Tuohey's opinion that insufficient consideration "... has been given to the adverse traffic and transportation effects which will be generated during the work on Customs Street and consider the mitigation measures proposed are inadequate to maintain reasonable access to and from the CBD or across the CBD." Mr Tuohey saw shortcomings in data concerning the capacity which would be available along Customs Street, and he gave the opinion that adverse effects of the Quay Street closure had not been sufficiently considered. He referred to analysis he had undertaken as to the capacity of the CBD roading network in relation to perceived problems which would arise. However in cross-examination he agreed that Mr McDonald's requests for access to this work had not been met, so it had not been tested in the way that evidence placed before the Court by the appellants had been.

239. Witnesses with businesses in the central business district were concerned about the effects of traffic

disruption and the effects of non-availability of parking during the construction period.

240. Mr McDonald summarised his opinion in these terms “...I am able to conclude that the proposed construction activity, with the mitigation measures described, can be accommodated on the roading network in a manner which will not compromise the capacity of the roading system or its intersections, and without more than a minor adverse effect on the amenity of other road users.”

241. Given the scale of the Britomart proposal, its location in the central area of the Auckland waterfront, and the construction period involved, we accept that the adverse effects experienced by some road users and property owners, on some occasions, and in some locations, would be more than minor. However, given the overall Auckland traffic environment, and the potential traffic movements over the construction period together with the number of persons potentially involved, we find Mr McDonald’s conclusion reasonable.

242. We are also mindful that issues of road levels and constructions and reconstructions, traffic flows and controls, and road closures are all functions of the City Council as the road controlling agency. Discharging its responsibilities in that capacity, the City Council is not required to seek resource consent to implement its decisions, nor is it accountable to this Court.

### Sea level and climate change

243. We have held that the sea level and climate change issues raised by Mrs Hicks and Mr Jones are relevant only to the extent that the bases for ground water modelling had been properly prepared, having regard to such contingencies.

244. That question was addressed by Mr Pattle in rebuttal evidence. The witness explained that the worst-case prediction in tables presented by Mrs Hicks for the ten-year scope of the model was for a rise of 5 to 10 centimetres. He deposed that this would scarcely be noticed given the 1 metre fluctuations occurring within the model from present tidal and rainfall variations. He also gave the opinion that planning for long term effects is applicable to the whole of the central business district, and would occur irrespective of the Britomart proposal.

245. Furthermore Dr Toan, in his rebuttal evidence, deposed that even given the worst case scenario for sea level rise by the year 2100 of just under a metre, the Quay Street underpass would be well above sea level, and that consequently sea-level rise itself would not cause flooding of the transport centre. He also explained that storm surges and far-field tsunamis are events for which there would be a warning period sufficiently long to allow the evacuation

of the whole of downtown Auckland including the transport centre. Any flooding occurring as a result of such events would need to be pumped away prior to reoccupation. Dr Toan added that the overall proposal is at a preliminary stage of design, and that these were some of a number of matters which would be addressed in more detail in the plans for building consents in the event of the development proceeding.

246. We find that those concerned with the planning and design of this centre are well aware of the matters raised by Mrs Hicks and Mr Jones, and that the groundwater modelling has been properly prepared by competent professional people having the appropriate knowledge and skills.

### DECISION ON TRANSPORT CENTRE EARTHWORKS

247. Having had regard to the actual and potential effects of allowing the activity, we move to the next stage of the decision process. In the case of the earthworks for the transport centre, being a restricted discretionary activity, the exercise of discretion to refuse consent, and to impose conditions, is restricted to the eleven matters specified in Rule 5.4.3.2 of the *Auckland Regional Plan: Sediment Control*. We should consider each of them separately.

#### *Sediment control measures*

248. The first of the specified matters reads:

- (a) techniques used to restrict or control sediment being transported from the site and the effects or impacts of sediment on water quality from the techniques chosen, including the practicality and efficiency of the proposed control measures.

249. This topic was the subject of evidence given by Dr K R Laing and Mr C H Jenkins, on behalf of the appellants. Neither was cross-examined, nor was any expert evidence called on behalf of the respondent or any opponent on the topic.

250. In his evidence Mr D J Meek (a construction engineer) described the stormwater treatment facilities proposed. In summary, the water would be collected in sumps, and pumped to a storage and treatment tank with capacity for total flows of up to 10 litres per second. The outflow from the tank would pass to the City stormwater system, from which it would be discharged into the Waitemata Harbour, near Captain Cook Wharf.

251. The treatment system would including flocculation, sedimentation, and automatic valving to prevent outflow in excess of the turbidity standards defined. Mr Jenkins gave the opinion (which was uncontested) that the system would remove up to 98% of suspended solids.

252. Conditions agreed by the appellants and the Regional Council involve minimum standards of turbidity<sup>47</sup>, and a rigorous monitoring programme<sup>48</sup>. In addition there would be provision for review of the conditions<sup>49</sup>, and a requirement for a bond to secure compliance with the conditions<sup>50</sup>. In the absence of any submission or evidence to the contrary we are satisfied that there is no basis for consent, subject to the agreed conditions, to be refused by reference to this criterion.

#### *Proportion of catchment*

253. The next criterion is—

- (b) the proportion of the catchment which is exposed.

254. The total area the subject of the earthworks application is about 6 hectares. Although that is a large site in the inner city, it is plainly only a small proportion of the total catchment. As a proportion of the total area of the catchment, the area that would be exposed to sediment transport subject to compliance with the proposed conditions would not provide a ground for refusing consent or for imposing additional conditions.

#### *Proximity to receiving environment*

255. The third of the matters specified is—

- (c) the proximity of the operation to the receiving environment.

256. The operation would be very close to the harbour, which would be the receiving environment of sediment suspended in the stormwater runoff from the excavation. The unchallenged evidence of Dr Laing was that the discharge would have no measurable effect or adverse visual impact in the waters of the harbour.

#### *Concentration and volume of sediment*

257. The next matter is—

- (d) the concentration and volume of any sediment that may be discharged.

258. The average flow of the discharge would correspond to 800 grams per hour of sediment or 12-15 tonnes in total (equivalent to about two truck-loads of soil) over the 24-month excavation period. Dr Laing deposed that the amount of sediment is within the normal variation currently experienced. Mr Jenkins deposed that the treated outflow would have minimal effect on the receiving waters.

259. There was no basis on the evidence for a finding that consent should be refused, or that a further condition should be imposed in these respects.

#### *Duration of exposure*

260. Then the consent authority has to consider—

- (e) the time during which the bare earth surface is exposed.

261. The duration of the exposure of bare earth is likely to be about 2 years, although the site would be roofed by a concrete floor slab. However the agreed conditions would adequately mitigate the risk of sediment discharge that could otherwise be a concern over such a long period of exposure.

#### *Time of year*

262. The next criterion is—

- (f) the time of the year when the activity is undertaken.

263. The scale of the earthmoving activity is such that it will occupy more than a year, so this criterion has little relevance in this case.

#### *Duration of consent*

264. Then consideration has to be given to—

- (g) the duration of the consent.

265. The agreed conditions stipulate a consent term expiring on 31 December 2002. The scale and location of the excavation make that a realistic minimum. There is no basis for refusing consent or imposing additional conditions in this respect.

#### *Monitoring*

266. The seventh criterion is—

- (h) monitoring the volume and concentration of any sediment that may be discharged;

267. The appellants and the Regional Council have agreed on a condition requiring monitoring the volume and concentration of sediment discharged. The condition was not challenged or contested. There is no basis for refusing consent or substituting a more stringent condition in this respect.

47 30 NTU for 95% of the discharge time; 40 NTU for 100% of the discharge time –see Condition 7.

48 See Condition 9.

49 See Condition 10.

50 See Condition 16.

*Administrative charges*

268. Then consideration has to be given to—

- (i) administrative charges under section 36 of the RM Act

269. However no issue was raised in these appeals in this respect, and we do not need to consider it further.

*Bond*

270. The specified matters also include—

- (j) bonds under section 108(1)(b) of the RM Act

271. One of the agreed conditions of the earthworks consent would require a bond to ensure compliance with the conditions. Although we have to consider the amount of the bond required for the water permit for the transport centre, there was no issue about the bond for the earthworks consent.

*Environmental Benefits*

272. The final matter specified is—

- (k) provision for obtaining Environmental Benefits (Financial Contributions –Refer to Section 5 of this Plan).

273. No party contended that there is any relevant issue or concern in this regard.

*Conclusion on earthworks*

274. We have considered all the matters specified in the relevant plan to which the exercise of discretion on the earthworks application has been restricted. Our consideration has been based on the uncontested evidence, and on the conditions agreed to by the appellants and the respondent. We have found no basis for refusing consent or for amending the conditions. On our understanding of Parliament's intent in amending the resource management regime by introducing provision for restricted discretionary activities, the appropriate course is for the Court to grant the earthworks consent and impose the agreed conditions.

**DECISION ON RAILWAY TUNNEL GROUNDWATER DIVERSION**

275. The appellants had agreed with the Regional Council on conditions to be attached to the resource consent for the water permit for diversion of groundwater during excavation of the railway tunnel. The Regional Council's

attitude was that on that basis it no longer opposed the grant of consent, and considered that any adverse environmental effects would be controlled by those conditions.

276. The appellants had also agreed with Mr Floyd on two additional conditions which he requested. The Regional Council did not expressly consent to or oppose the addition of those conditions. We presume that this ambivalent attitude arose from doubt about the relevance of the conditions to the subject-matter of the grant. However as they became part of the appellants' case as presented to the Court, successive consent-holders would be estopped from challenging those conditions<sup>51</sup>. It is appropriate that we consider whether the resource consent should be granted or refused on the basis that if it is granted, all of the conditions, include those proposed by Mr Floyd, would be imposed.

277. On that basis there was no opposition to the allowing of Appeal RMA 392/97 and the granting of the resource consent. Having heard the evidence it is our judgment that the grant would serve the promotion of sustainable management of natural and physical resources. Resource consent subject to compliance with those conditions should be granted accordingly.

**DECISION ON TRANSPORT CENTRE GROUNDWATER DIVERSION**

278. By contrast the granting or refusing of resource consent for the taking and diversion of groundwater associated with the transport and parking centre and the lowering of the Quay Street carriageway from Britomart Place to Queen Elizabeth Square remained fully contested. In approaching the exercise of the judgment to grant or refuse that consent, we should identify the terms on which it would be granted if that is to be the outcome.

**Assurances**

279. There are provisions in the conditions proposed by the appellants and the respondent which are intended to provide assurances against adverse effects of the exercise of the water permit. The opponents, in particular the BOMA group, contended that these assurances would not be adequate in various respects. We address separately the proposals for a bond, for a monitoring and contingency plan, for an audit group, and for review of conditions.

*Bond*

280. Condition 8 would require the consent-holder to enter into and maintain a bond in favour of the Auckland

<sup>51</sup> *Augier v Secretary of State for the Environment* (1979) 38 P & C R 219 (QBD).

Regional Council to provide for compliance with conditions of the resource consents for diversion and taking of groundwater, and for earthworks, in respect of the proposed transport terminal and car park<sup>52</sup>. The amount of the bond is to be \$20 million, and the term is to be equivalent to the term of the water permit consent plus 5 years<sup>53</sup>. The amount is to be varied annually in accordance with the Works Construction Cost Index or a suitable alternative<sup>54</sup>. The bond is to provide that the consent-holder is to remain liable for any breach of conditions which occurs before the expiry of the consent and for any adverse effects on the environment which become apparent during or after the expiry of the consent<sup>55</sup>. There is provision for review of the terms of the bond to ensure that they are appropriate to the level of risk occasioned by the activities which are the subject of the consent<sup>56</sup>.

281. The Regional Council maintained that the bond would allow it to undertake monitoring and implementation of remedial measures should the consent-holder be unable or unwilling to undertake its responsibilities.

282. The BOMA group did not accept that \$20 million would be adequate to cover the range of contingencies, or to cover the cost of sealing and anchoring the structure. Of the provision for the bond to be “topped up”, Mr Bartlett observed that it would leave the Regional Council in a vulnerable position if after a significant draw-down on the bond, the consent-holder was unable to provide the top-up. He acknowledged that this would not be a concern while the consent holder is the Auckland City Council, with its ability to levy rates, but he observed that the consent could be transferred to a limited liability company. Mr Bartlett submitted that the amount should be independent of the person who is the consent-holder, and that the amount of \$20 million is not reliable. He referred to a statement by counsel for the City Council at the first-instance hearing that the cost of sealing and anchoring the structure as part of the initial construction would be between \$35 million and \$50 million, and his clients did not accept that retrofitting, even taking account the reduced size of level B5, would only cost half as much. The BOMA group urged that the bond should be for a reasonably foreseeable maximum amount to be determined by the Court after the agreed methodology has been developed.

283. However the condition also provides that any transferee of the resource consent has to enter into and thereafter maintain a bond in the same terms, the initial amount to be determined by a designated Regional Council official. Further, the only evidence on the amount of the bond, that of Mr Bloxham, did not provide a basis for finding that the bond would have to be for a different

amount to serve its purpose. The City Council urged that the Court should have regard to the respondent’s case that the amount of the bond is adequate.

284. The Environment Court has no executive functions of supervising the exercise of resource consents, or of attending to any remedial works in default of the consent holder. Its material function is confined to giving decisions on the resource consent applications in place of the decisions given by the Regional Council’s commissioners. It is the Regional Council which would have responsibility for administering the water permit consent, if granted.

285. The Regional Council is satisfied that the provisions about the amount of the bond are adequate to enable it to perform its responsibilities to the public. The amount is not challenged by the applicant. In those circumstances we see no need for the Court to interfere. Rather, we should make our judgment whether consent should be granted or refused on the basis that if it is granted, Condition 8 would be among the conditions that would be imposed.

#### *Monitoring and contingency plan*

286. It was the case for the BOMA group that the monitoring and contingency plan should be decided by the Court. The Regional Council took a similar position, and accepted that not all details can be decided at this stage.

287. Mr Cooper submitted that in relation to contingency measures, substantial evidence had been submitted to the Court which should enable the Court to conclude that there will be available contingency measures should any unpredicted event occur. He contended that for the Court to determine the details of the plan would be to take the position of a building consent authority.

288. We consider that the settlement of the monitoring and contingency plan can be distinguished from determining the initial amount of the bond. We accept that we can make our judgment whether consent should be granted or refused on the basis that there will be adequate contingency measures. We also accept that until the design has been advanced, it is not practicable to settle the details of the monitoring and contingency plan. Approval of details of the plan might in such circumstances be entrusted to a designated official of the Regional Council as certifier.

289. We do not lack confidence in that procedure. However in this case those with interests in buildings in the vicinity have a stake in the adequacy of the monitoring and contingency plan, and should have opportunity to propose improvements before it is finally settled. There is

52 Condition 8 (b) and (c).

53 Condition 8(c).

54 Condition 8(d)(i).

55 Condition 8(e).

56 Condition 8(f).

not an established procedure for that, if the plan is to be settled by a Regional Council official. In the circumstances, it would not be appropriate for the Court to delegate to a certifier the settling of the monitoring and contingency plan. We should make our judgment on whether consent should be granted or refused on the basis that if it is granted, the Court would itself settle the plan, and would provide an opportunity for anyone affected to make representations about the contents of the plan. We do not intend that the Court would be intruding into the responsibility of a building consent authority. Rather the scope of its interest would remain the effects on the environment of exercising consent to divert and take groundwater.

290. The BOMA group also contended that Condition 12 should be amended so that changes to the monitoring and contingency plan should be susceptible to appeal by those with interests in property affected.

291. We do not accept that every change to the monitoring and contingency plan needs to be susceptible to appeal. However the plan would be required by the conditions of consent. We consider that it would be appropriate that the provisions of the Act about changes to conditions should also apply to changes to the monitoring and contingency plan. Judgments about whether an application for change should be notified (making the decision susceptible of appeal) could then be made in the particular circumstances according to the provisions of section 127(3) of the Act.

#### *Audit group*

292. The conditions proposed provide for an audit group whose approval would be required for changes in design<sup>57</sup>. It would provide expert independent advice to the Regional Council, and would review monitoring, dewatering, ground or building settlement and retaining wall movement, and complaints. It could require and review remedial actions, recommend review of the conditions, review the monitoring and contingency plan, and check compliance with the conditions.

293. Three issues were raised about the provision for the audit group. The BOMA group argued that the audit group should be retained by the Regional Council, not by the consent-holder; and that the audit group should not approve variations of conditions of consent without recourse to or hearing private interests affected. Mr McRae contended that a person representative of the public should be added to the audit group.

294. Having considered the first point, we have concluded

that it lacks substance. Condition 20 provides for the consent-holder to retain the audit group. The condition also expressly states that the audit group is to be briefed by and report to the Group Manager, Environmental Management Department, Auckland Regional Council (who has to approve the composition of the group), and that the role of the audit group is to provide expert, independent advice to that official. The intent is clear that the audit group is to be independent of the consent-holder, and is to be responsible to the relevant Regional Council official.

295. On the second point, we agree that it would not be appropriate for the audit group to dispense with compliance with conditions of consent, or to approve variations to the resource consent or its conditions. We have reviewed the conditions referred to by counsel in this respect, and have not found anything in them which purports to confer such authority on the audit group. For avoidance of doubt, we declare that if consent is granted and the agreed conditions are imposed, they should not be construed as doing so.

296. We have also reviewed the conditions stating functions of the audit group in the light of Mr McRae's suggestion of adding to the group a person who is not a specialist engineer, but who would be a representative of the public. We have concluded that virtually all of the functions of the audit group relate to technical issues. A person lacking the relevant qualifications would not have a pertinent contribution to make. Further, the responsibility of the audit group to the relevant public authority would ensure that the members would perform their functions in the public interest. We have not been persuaded that the condition should be amended in the way proposed by Mr McRae.

#### *Review of conditions*

297. Condition 1 would reserve to the Regional Council the initiative to review the conditions for dealing with any adverse effects on the environment, particularly effects on buildings and services surrounding the site, altering monitoring requirements, altering the quantity of water diverted and taken, considering changes to conditions recommended by the audit group, and considering the continued need for, or an adjustment of the amount secured by, the bond.

298. There was no opposition to this condition by the appellants or by any of the other parties. The condition forms part of the proposal and gives the Court further assurance that the Regional Council's oversight of the exercise of the consent is capable of being responsive to developments that arise.

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<sup>57</sup> Conditions 20 and 35.



## Other conditions

### Condition 2

299. The conditions proposed by the City Council and the Regional Council included Condition 2, which stipulates –

The excavation and underground developments shall be designed and constructed in a manner that there is no damage to buildings surrounding the site.

300. The BOMA group argued that the conditions should provide that all construction cease in the event of the applicant being unable to comply with this condition.

301. We consider that such a provision would not be consistent with the intention of the Act for failure to comply with conditions. The scheme of the Act provides a range of remedies for failure to comply with conditions, allowing a graduated response by the consent authority according to the gravity of the non-compliance and its effects. Beyond the advice and education responses which require no statutory authority, abatement notices<sup>58</sup>, and enforcement orders<sup>59</sup>, are available for contravention of a resource consent; as are prosecutions for non-compliance with abatement notices or enforcement orders<sup>60</sup>. Each of those remedies has procedures which allow for judgment to be exercised so that the sanction is not disproportionate in the circumstances. Provision such as that proposed by the BOMA group would lack that feature. Ambiguity about what is meant by damage could lead to claims that construction work cease even where minor surficial settlement effects have been observed. That may be disproportionate. We prefer to leave the consequences of alleged failure to comply with Condition 2 to the remedies and procedures provided by Parliament.

### Condition 4

302. This condition makes detailed provisions for an independent survey of the structural condition of certain identified buildings in the vicinity of the site. The condition stipulates that this is to be done before any pile installation or excavation commences.

303. The BOMA group contended that it is fundamental to the Court's understanding of the achievability of Condition 2 that the survey be made before consent is granted, and that the decision not be with the audit group or the Regional Council but with the Court.

304. We did not understand this contention, as the condition does not provide for a decision, but for a technical survey of the condition of certain buildings. When we invited Mr Bartlett to explain the contention further, he observed that the survey is unlikely to provide information about existing stresses in particular buildings. He gave as examples that by looking at a brick you cannot know how much pressure it is under or when it is going to break; and that you cannot tell if a floor has hard spots under it without breaking up the whole floor and checking.

305. That may be. However the condition calls for the survey to be made by a registered engineer, who is to certify that the survey and report was “completed in a professional manner and is an accurate assessment of the structural conditions of the building.” In our judgment that is an appropriate standard and one that is fair and reasonable in the circumstances. We are not persuaded that Condition 4 should be amended in the way proposed by the BOMA group.

### Condition 5

306. Condition 5 would require a survey of the structural conditions of all other structures and buildings within two blocks of land near the site in order to confirm and document existing conditions and provide a baseline against which any future apparent changes in condition could be assessed. Again the survey is to be made by a registered engineer who is to certify to the Regional Council that it was completed in a professional manner and is an accurate assessment.

307. The BOMA group contended that the issues to be assessed are fundamental to the Court's analysis of ability to comply with Condition 2. Mr Bartlett argued that this should be evaluated by a party other than the Court. He observed that the engineer making the survey is not required to certify that there will be no damage in terms of Condition 2.

308. Our understanding of the condition is different. We do not accept that the purpose of the survey is to enable anyone to certify that there will be no damage. Rather the survey is to provide a record of the existing condition of the buildings, prior to exercise of the resource consent, to allow reliable comparison with their condition during and after exercise of the consent. In our judgment the condition is appropriate, and we do not accept the BOMA group's case in this respect.

<sup>58</sup> Resource Management Act 1991, section 322.

<sup>59</sup> *Ibid*, section 314(1).

<sup>60</sup> *Ibid*, section 338(1).

### Condition 7

309. Condition 7 would require—

The Consent Holder shall carry out a survey to assess the susceptibility of critical services to adverse effects arising from extreme levels of settlement, for example fibre optic cables, sanitary drainage, gas, and (rigid) water mains. This shall be completed in areas of the site where work will potentially affect such services. This survey shall be reported to the Audit Group upon completion of the survey.

310. The BOMA group pointed out that compliance with this condition is of interest not just to those who own the services, but also to those who depend on their functioning. They observed that there is no requirement on when the survey is to be made, or what steps are to be taken in respect of identified risks.

311. We accept those submissions. Like Conditions 4 and 5, the survey required by Condition 7 should be made before exercising the consent. The potential variability of the conditions of the services and the appropriate responses precludes stipulating those responses in the conditions. That is rightly entrusted to the audit group.

### Condition 28

312. Condition 28 would stipulate that stated building and ground settlement limits are not to be exceeded. The limits are stated to be maximum allowable limits, and are expressed in millimetres, save that for planar tilting, which is expressed as “1 in 1,000 on vertical, not exceeding 15 millimetres at any location.”

313. The condition also requires that the consent-holder respond to trigger levels. Level 1 is where monitoring data show settlement exceeding 50% of the maximum allowable limit, but not exceeding 5 millimetres. The responses required are notification of the audit group, increasing frequency of monitoring, carrying out investigations and analysis as required by the audit group and according to the monitoring and contingency plan; design of mitigation measures and, if approved by the audit group, implementation of them.

314. Level 2 is where monitoring data show settlement exceeding 100% of the limit. In that event, the condition requires an immediate hold on all project works which are or have potential to cause exceedance, and implementation of remedial measures.

315. The BOMA group contended that, in the absence of the results of the structural survey, the appellants’ evidence does not establish what the limits are; and given the possible variances in the condition of buildings in the area, it is not clear that any levels can be set at this stage.

316. We understand that to mean that settlement of a particular building to the extent stated as the maximum allowable limit (or even to 50% of that limit) might result in damage to the building; and that the potential for that cannot be assessed until the building condition survey has been made, and may not be able to be assessed even then.

317. That seems to us to be a reiteration of the point made in respect of Conditions 4 and 5. We do not accept it for reasons corresponding with those we gave in respect of those conditions.

### Summary

318. In summary, we will make our judgment whether consent for the diversion and taking of groundwater should be granted or refused on the basis that if it is granted, conditions would be imposed as proposed by the appellants and the Regional Council but with the following amendments:

- (a) Condition 7 would be amended to require the survey to be completed and the report on it made to the audit group at least one week prior to starting exercise of the consent.
- (b) Condition 12 would be amended to express that proposals for changes to the monitoring and contingency plan are to be the subject of applications for change of conditions of consent in terms of section 127 of the Resource Management Act.

### Assessment and judgment

319. We have had regard to such of the matters listed in section 104(1) of the Act as are relevant to the transport centre water permit. We have now to make a judgment in terms of section 105(1)(b) of the Act to grant or refuse consent. That judgment has to be made to achieve the purpose of the Act stated and defined in section 5, and in compliance with the directions in the other sections of Part II of the Act, recognising that they are subordinate and accessory to the purpose of the Act<sup>61</sup>. We do so on the basis of our findings from our analysis of the evidence that the settlements due to groundwater drawdown are not likely to cause damage to adjacent buildings; that at most

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<sup>61</sup> See *Application by Canterbury Regional Council* [1995] NZRMA 110, 126; *Judges Bay Residents Assn v Auckland Regional Council* Environment Court Decision A72/98, paragraphs 404, 406; and *Mahuta v Waikato Regional Council and Anchor Products* Environment Court Decision A91/98, paragraphs 228-229.

there is only a very slight risk of settlement damage to buildings in the wider locality; and that remedial measures triggered by the conditions would mitigate any damage that did occur. In short, there would not be likely to be any significant adverse effect on the environment of allowing the diversion and taking of groundwater in accordance with the proposed conditions.

#### *Application of planning instruments*

320. The site is in an area where the natural character of the coastal environment has long since been compromised; and the diversion and taking of groundwater in accordance with the conditions would not have an adverse effect on that environment, on its own or cumulatively. The proposal does not conflict with the *New Zealand Coastal Policy Statement*.

321. The proposed diversion and taking of groundwater in accordance with the conditions would avoid and mitigate adverse effects on the environment and on amenity values, and would not imperil natural resources or efficient use of them. It would not conflict with the *Auckland Regional Policy Statement*.

322. There is no regional plan which relates to the proposed diversion and taking of groundwater. Those activities are proposed to facilitate establishment of a transport and parking centre designated in the district plan and consistent with the *Auckland Regional Land Transport Strategy*.

323. In short, the proposed diversion and taking of groundwater is in accordance with the relevant planning instruments.

## **Part II**

324. We have considered the various provisions of sections 6, 7 and 8 in Part II of the Act. None of them was specifically relied on by opponents of the proposal. The Regional Council submitted that there is nothing in them which suggests that the consent should be declined, and we agree with that.

325. We have quoted section 5 of the Act earlier in this decision. In the context of this application for a water permit, it is our judgment that the proposed diversion and taking of groundwater in compliance with the proposed

amended conditions would be managing the use of the land and groundwater resources in a way and at a rate which would enable the community to provide for their social and economic wellbeing, and for their safety. It would not imperil the potential of the resources to meet reasonably foreseeable needs of future generations. It would safeguard the life-supporting capacity of the media listed in section 5(2)(b). Of particular relevance in the light of the opposition to Appeal RMA 384/97, it would avoid and mitigate adverse effects of the proposed activities on the environment. We conclude that granting consent subject to those conditions would promote sustainable management of natural and physical resources as defined. Consent should be granted accordingly.

## **DETERMINATIONS**

326. In the result, all three appeals will be allowed, and the relevant resource consents granted, subject to the proposed conditions. In the case of the diversion and taking of groundwater for the transport and parking centre, the grant of consent cannot be made until two further steps have been taken. First, amendments have to be made to the proposed conditions as described in this decision. Other drafting amendments are also needed, for instance conditions 17 and 29(v) of consent 96 11104. Secondly, the monitoring and contingency plan has to be settled, after allowing opportunity for those affected to make representations to the Court. In the case of the earthworks consent, and the consent for groundwater diversion during construction of the railway tunnel, counsel are invited to present agreed forms of orders granting the consents and imposing the conditions. If agreement cannot be reached, the presiding judge will settle any differences after hearing counsel.

## **COSTS**

327. The costs of the appellants and the respondent of and incidental to these appeals are reserved.

**DATED at AUCKLAND this day of March 1999.**

DFG Sheppard  
Environment Judge

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**A.P. POLLUTION CONTROL BOARD V. PROF. M.V. NAYUDU (RETD.)1999 S.O.L. CASE NO. 53**

**SUPREME COURT OF INDIA**

Before :- S.B. Majmudar and M. Jagannadha Rao, JJ.  
Civil Appeal Nos. 368-371 of 1999 (Arising out of SLP (C) Nos. 10317-10320 of  
1998). D/d. 27.1.1999

A.P. Pollution Control Board - Appellant  
Versus

Prof. M.V. Nayudu (Retd.) - Respondent

**WITH**

Civil Appeal Nos. 372, 373 of 1999 (Arising out of SLP (C) Nos. 10330 and 13380  
of 1998).

For the Appellant :- Mr. R.N. Trivedi, Additional Solicitor General with Mr.  
Nikhil Nayyar, Mr. S.V. Bhatt and Ms. Urmila Sirur, Advocates in C.A. Nos.  
368-371 and 371 of 1999.

For the Appellant :- Mr. P.S. Narasimha, Advocate for Mr. V.G. Pragasam,  
Advocate in C.A. No. 373 of 1999.

For the Respondents :- Mr. M.N. Rao, Senior Advocate with Mr. K. Ram Kumar, Mr.  
Y. Subba Rao, Ms. Asha G. Nair, Mr. Sridhar, Ms. Santinarayan and Mr. A. Subba  
Rao, Advocates.

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A. Pollution Control matters - Precautionary principle - Precautionary principle is still evolving though it is accepted as part of the international customary law - It applies according to the situation and circumstances of each case. [Para 31]

B. Pollution Control matters - Burden of proof - Widespread toxic pollution is major threat to essential ecological processes - It is appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to environment - They are to discharge this burden by showing the absence of a reasonable ecological or medical concern - Result would be that if insufficient evidence is presented by them to alleviate concern about the level of uncertainty, then the presumption should operate in favour of environmental protection. [Paras 34 and 35]

C. Pollution Control matters - Environment and Pollution Control matters - Technical matters - The Courts do not possess the expertise in all technical and scientific matters of extreme complexity - The Tribunals or the appellate authorities dealing with such matters must be manned by technical personnels well versed in environmental laws in addition to judicial members - Such defects in the constitution of these bodies can certainly undermine the very purpose of the legislations. [Paras 38, 42 and 43]

D. Constitution of India, Articles 32, 136 and 226 - Reference - Pollution Control matters - Environmental matters - While dealing with environmental matters the Supreme Court and the High Courts can make a reference to the expert bodies/Tribunals having expertise in scientific and technical aspects for investigation and opinion - Any opinion rendered by such bodies would be subject to the approval of the Court - Against M/s Surana Oils and Derivatives (India) Ltd. in a petition filed by the Pollution Control Board, the Supreme Court referred the following questions to the Appellate Authority under the National Environmental Appellate Authority Act, 1997 :- (a) Is the respondent industry a hazardous one and what is its pollution potentiality, taking into account, the nature of the product, the effluents and its location ? (b) Whether the operation of the industry is likely to affect the sensitive catchment area resulting in pollution of the Himayat Sagar and Osman Sagar lakes supplying drinking water to the twin cities of Hyderabad and Secunderabad ? [Para 53]

Cases referred :-

1. Vellore Citizens' Welfare Forum v. Union of India and others, 1995(5) SCC 647.
2. Ashburton Acclimatisation Society v. Federated Farmers of New Zealand, 1988(1) NZLR 78.
3. M.C. Mehta v. Union of India and Shriram Foods and Fertilizers, 1986(2) SCC 175.
5. Paramjit Kaur v. State of Punjab, 1998(5) SCALE 219 : 1998(6) J.T. 338.

## JUDGMENT

M. Jagannadha Rao, J. - Leave granted in all the special leave petitions. It is said :

“The basic insight of ecology is that all living things exist in interrelate systems; nothing exists in isolation. The word system is weblike; to pluck one strand is to cause all to vibrate; whatever happens to one part has ramifications for all the rest. Our actions are not individual but social; they reverberate throughout the whole ecosystem”. [Science Action Coalition by A. Fritsch, Environmental Ethics : Choices for Concerned Citizens 3-4 (1980)]. (1988) Vol. 12 Harv. Env. L. Rev. at 313.”

Four of these appeals which arise out of the SLP (C) Nos. 10317-10320 of 1998 were filed against the judgment of the Andhra Pradesh High Court dated 1.5.1998 in four writ petitions, namely, W.P. No. 17832 of 1997 and three other connected writ petitions. All the appeals were filed by the A.P. Pollution Control Board. Three of the above writ petitions were filed as public interest cases by certain persons and the fourth writ petition was filed by the Gram Panchayat, Peddaspur.

2. The fifth Civil Appeal which arises out of SLP(C) No. 13380 of 1998 was filed against the judgment in W.P. No. 16969 of 1997 by the Society for Preservation of Environment and Quality of Life, (for short 'SPEQL') represented by Sri P. Janardan Reddi, the petitioner in the said writ petition. The High Court dismissed all these writ petitions.

3. The sixth civil appeal which arises out of SLP(C) No. 10330 of 1998 was filed by A.P. Pollution Control Board against the order dated 1.5.1998 in Writ Petition No. 11803 of 1998. The said writ petition was filed by M/s Surana Oils and Derivatives (India) Ltd. (hereinafter called the 'respondent company'), for implementation of the directions given by the appellate authority under the Water (Prevention of Pollution) Act, 1974 (hereinafter called the 'Water Act, 1974') in favour of the company. In other words, the A.P. Pollution Board is the appellant in five appeals and the SPEQL is appellant in one of the appeals.

4. According to the Pollution Control Board, under the notification No. J.20011/15/88-iA, Ministry of Environment and Forests, Government of India dated 27.9.1988, 'vegetable oils including solved extracted oils' (Item No. 37) was listed in the 'RED' hazardous category. The Pollution Board contends that Notification No. J.120012/38/86 1A, Ministry of Environment and Forests of Government of India dated 1.2.1989, prohibits the location of the industry of the type proposed to be established by the respondent company, which will fall under categorisation at No. 11 same category of industry in Doon Valley.

5. On 31.3.1994, based on an Interim Report of the Expert Committee constituted by the Hyderabad Metropolitan Water Supply and Sewerage Board, the Municipal Administration and Urban Development, Government of Andhra Pradesh issued GOMs 192 dated 31.3.1994 prohibited various types of development within 10 k.m. radius of the two lakes, Himayat Sagar and Osman Sagar, in order to monitor the quality of water in these reservoirs which supply water to the twin cities of Hyderabad and Secunderabad.

6. In January 1995, the respondent company was incorporated as public limited company with the object of setting up an industry for production of B.S.S. Castor oil derivatives such as Hydrogenated Castor Oil, 12-Hydroxy Stearic Acid, Dehydrated Castor Oil, Methylated 12-HSA, D. Co., Fatty Acids with by-products like Glycerine, Spent Bleaching Earth and Carbon and Spent Nickel Catalyst. Thereafter the industry applied to the Ministry of Industries, Government of India for letter of intent under the Industries (Development Regulation) Act, 1951.

7. The respondent Company purchased 12 acres of land on 26.9.1995 in Peddashedpur village, Shamshabad Mandal. The Company also applied for consent for establishment of the industry through the single window clearance committee of the Commissionerate of Industries, Government of Andhra Pradesh, in November, 1995. On 28.11.1995, the Government of Andhra Pradesh, wrote to the Ministry of Industry, Government of India as follows :

“The State Government recommends the application of the unit for grant of letter of intent for the manufacture of B.S.S. Grade Castor Oil in relaxation of locational restriction subject to NOC from A.P. Pollution Control Board, prior to taking implementation steps.”

On 9.1.1996, the Government of India issued letter of intent for manufacture of B.S.S. grade Castor Oil (15,000 tons per annum) and Glycerine (600 tons per annum). The issuance of licence was subject to various conditions, inter-alia, as follows :-

- “(a) you shall obtain a confirmation from the State Director of Industries that the site of the project has been approved from the environmental angle by the competent State authority.
- (b) you shall obtain a certificate from the concerned State Pollution Control Board to the effect that the measures envisaged for pollution control and the equipment proposed to be installed meet their requirements.”

Therefore, the respondent company had to obtain NOC from the A.P. Pollution Control Board.

8. According to the A.P. Pollution Control Board (the appellant), the respondent company could not have commenced civil works and construction of its factory,

without obtaining the clearance of the A.P. Pollution Control Board - as the relaxation by government from location restriction as stated in their letter dated 28.11.1995, was subject to such clearance. On 8.3.1996, on receipt of the 2nd Interim Report of the Expert Committee of the Hyderabad Metropolitan Water Supply and Sewerage Board, the Municipal Administration and Urban Development Department issued GO No. 111 on 8.3.1996 reiterating the 10 k.m. prohibition as contained in the GO 192 dated 31.3.1994 but making some concessions in favour of residential development.

9. In the pre-scrutiny stage on 24.5.1996 by the Single Window Clearance Committee, which the company's representative attended, the application of the industry was rejected by the A.P. Pollution Control Board since the proposed site fell within 10 k.m. and such a location was not permissible as per GOMs 111 dated 8.3.96. On 31.5.1994, the Gram Panchayat approved plans for establishing factory.

10. On 31.3.1996, the Commissionerate of Industries rejected the location and directed alternative site to be selected. On 7.9.1996, the Dt. Collector granted permission for conversion of the site (i.e. within 10 k.m.) to be used for non-agricultural purposes.

11. On 7.4.1997, the company applied to the A.P. Pollution Control Board, seeking clearance to set-up the unit under Section 25 of the Water Act. It may be noted that in the said application, the Company listed the following as by-products of its processes :

“Glycerine, spent bleaching earth and carbon and spent nickel catalysts.”

According to the AP Pollution Board the products manufactured by this industry would lead to the following sources of pollution :

- “(a) Nickel (Solid waste) which is heavy metal and also a hazardous waste under Hazardous Waste (Management and Handling) Rules, 1989.
- (b) There is a potential of discharge or run off from the factory combined joining oil and other waste products.
- (c) Emission of Sulphur Dioxide and oxide of nitrogen. It was at that juncture that the company secured from the Government of A.P. by GOMs 153 dated 3.7.1997 exemption from the operation of GOMs 111 of 8.3.1996 which prescribed the 10 k.m. rule from the Osman Sagar and Himayat Sagar Lakes.

12. In regard to grant of NOC by the A.P. Pollution Board, the said Board by letter dated 30.7.1997 rejected the application dated 7.4.1997 for consent, stating :

“(1) The unit is a polluting industry and falls under the red category of polluting industry under section S. No. 11 of the classification of industries adopted by MOEF, GOI and opined

that it would not be desirable to locate such industry in the catchment area of Himayatsagar in view of the GOMs No. 111 dated 8.3.1996.

- (2) The proposal to set up this unit was rejected at the pre-scrutiny level during the meeting of CDCC/DIPC held on 24.5.1996 in view of the State Government Order No. 111 dated 8.3.1996.”

Aggrieved by the above letter of rejection, the respondent company appealed under section 28 of the Water Act. Before the appellate authority, the industry filed an affidavit of Prof. M. Santappa, Scientific Officer to the Tamil Nadu Pollution Control Board in support of its contentions.

13. The appellate authority under section 28 of the Water Act, 1974 [Justice M. Ranga Reddy, (retd.)] by order dated 5.1.1998 allowed the appeal of the company. Before the appellate authority, as already stated, an affidavit was filed by Prof. M. Shantappa, a retired scientist and technologist (at that time, Scientific, Advisor for T.N. Pollution Control Board) stating that the respondent had adopted the latest eco-friendly technology using all the safeguards regarding pollution. The appellate authority stated that Dr. Siddhu, formerly Scientific (Advisor) to the Government of India and who acted as Director General, Council of Scientific and Industrial Research (CSIR) and who was the Chairman of the Board of Directors of this company also filed an affidavit. The Managing Director of the respondent company filed an affidavit explaining the details of the technology employed in the erection of the plant. Prof. M. Shantappa in his report stated that the company has used the technology obtained from the Indian Institute of Chemical Technology (IICT), Hyderabad which is premier institute and that he would not think of a better institute in the country for transfer of the technology. The said Institute has issued a certificate that this industry will not discharge any acidic effluents and the solid wastes which are the by-products are saleable and they will be collected in M.S. drums by mechanical process and sold. The report of Dr. Shantappa also showed that none of the by-products would fall on the ground of the factory premises. He also stated that all the conditions which were proposed to be imposed by the Technical Committee on the company at its meeting held on 16.7.97 have been complied with. On the basis of these reports, the appellate authority stated that this industry “is not a polluting industry”. It further held that the notification dated 1.2.1989 of the Ministry of Environment and Forests, Government of India, whereby industries manufacturing Hydrogenated Vegetable oils were categorised as “red category” industries, did not apply to the catchment areas of Himayat Sagar and Osman Sagar lakes and that notification was applicable only to the Doon Valley of UP and Dahanu in Maharashtra. The appellate authority accordingly directed the AP Pollution control Board to give its consent for establishment of the factory on such conditions the Board may deem fit as per GOMs 153 dated 3.7.1997 (as amended by GO 181 dated 7.8.1997).

14. Before the above order dated 5.1.98 was passed by the appellate authority, some of these public interest cases had already been filed. After the 5.1.98 order of the appellate authority, a direction was sought in the public interest case W.P. No. 2215 of 1996 that the order dated 5.1.1998 passed by the appellate authority was arbitrary and contrary to interim orders passed by the High Court in W.P. 17832, 16969 and 16881 of 1997.

15. The respondent company, in its turn filed WP No. 11803 of 1998 for directing the A.P. Pollution Control Board to give its consent, as a consequence to the order of the appellate authority dated 5.1.1998.

16. As stated earlier, the A.P. Pollution Control Board contends that the categorisation of industries into red, green and orange had already been made prior to the notification of 1.2.1989 by Office Memorandum of the Ministry of Environment and Forests, Government of India dated 27.9.1988 and that in that notification also ‘Vegetable oils including solvent extracted oils’ (Item No. 7) and ‘Vanaspati Hydrogenated Vegetable oils for industrial purposes (Item 37)’ were also included in the red category. It also contends that the company could not have started civil works unless NOC was given by the Board.

17. The Division Bench of the High Court in its judgment dated 1.5.1998, held that the writ petitioners who filed the public interest cases could not be said to be having no locus standi to file the writ petitions. The High Court observed that while the Technical Committee of the A.P. Pollution Control Board had, some time before its refusal, suggested certain safeguards to be followed by the company, the Board could not have suddenly refused the consent and that this showed double standards. The High Court referred to the order of the Appellate authority under Section 28 of the Water Act dated 5.1.98 and the report of Dr. Sidhu, to the effect that even if hazardous waste was a by-product, the same could be controlled if the safeguards mentioned in the Hazardous Wastes (Management and Handling) Rules, 1989 were followed and in particular those in Rules 5, 6 and 11, were taken. The Rules made under Manufacture, Storage and Import of Hazardous Chemical (MSIHC) Rules, 1989 also permit industrial activities provided the safeguards mentioned therein are taken. The Chemical Accidents (Emergency Planning, Preparedness and Response) Rules, 1991 supplement the MSIHC Rules, 1989 on accident preparedness and envisage a 4-tier crisis management system in the country. Therefore, merely because an industry produced hazardous substances, the consent could not be refused. It was stated that as the matter was highly technical, interference was not called for, as “rightly” contended by the learned counsel for the respondent company. The High Court could not sit in appeal over the order of the appellate authority. For the above reasons, the High Court dismissed the three public interest cases, and the writ petitions filed by the Gram Panchayat. The High Court allowed the writ petition filed by the respondent industry and directed grant of consent

by the A.P. Pollution Control Board subject to such conditions as might be imposed by the Board. It is against the said judgment that the A.P. Pollution Control Board has filed the five appeals. One appeal is filed by SPEQL. 18. In these appeals, we have heard the preliminary submission of Shri R.N.Trivedi, learned Additional Solicitor General for the A.P. Pollution Control Board, Shri M.N. Rao, learned senior counsel for the respondent company, and Shri P.S. Narasimha for the appellant in the appeal arising out of SLP (C) No. 13380 of 1998 and others.

19. It will be noticed that various issues arise in these appeals concerning the validity of the orders passed by the A.P. Pollution Control Board dated 30.7.97, the correctness of the order dated 5.1.98 of the Appellate Authority under Section 28 of the Water Act, the validity of GOMs No. 153 dated 3.7.97 by which Government of A.P. granted exemption for the operation of the 10 k.m. rule in GOMs 111 dated 8.3.1996. Questions also arise regarding the alleged breach of the provisions of the Act, rules or notification issued by the Central Government and the standards prescribed under the Water Act or rules or notifications. Question also arises whether the “appellate” authority could have said that as it was a highly technical matter, no interference was called for. We are just now not going into all these aspects but are confining ourselves to the issues on the technological side.

20. In matters regarding industrial pollution and in particular, in relation to the alleged breach of the provisions of the Water (Prevention and Control of Pollution) Act, 1974, its rules or notifications issued thereunder, serious issues involving pollution and related technology have been arising in appeals under Article 136 and in writ petitions under Article 32 of the Constitution of India filed in this Court and also in writ petitions before High Courts under Article 226. The cases involve the correctness of opinions on technological aspects expressed by the Pollution Control Boards or other bodies whose opinions are placed before the Courts. In such a situation, considerable difficulty is experienced by this Court or the High Courts in adjudicating upon the correctness of the technological and scientific opinions presented to the Courts or in regard to the efficacy of the technology proposed to be adopted by the industry or in regard to the need for alternative technology or modifications as suggested by the Pollution Control Board or other bodies. The present case illustrates such problems. It has become, therefore, necessary to refer to certain aspects of environmental law already decided by this Court and also to go into the above scientific problems, at some length and find solutions for the same. Environment Courts/Tribunals - problems of complex technology :

21. The difficulty faced by environmental courts in dealing with highly technological or scientific data appears to be a global phenomenon.

22. Lord Woolf, in his Garner lecture to UKELA, on the theme “Are the Judiciary Environmentally Myopic ?” (See 1992 J. Env'tl, Law Vol. 4, No. 1, P1) commented upon the problem of increasing specialisation in environmental law and on the difficulty of the Courts, in their present form, moving beyond their traditional role of detached “Wednesbury” review. He pointed out the need for a Court or Tribunal “having a general responsibility for overseeing and enforcing the safeguards provided for the protection of the environment ..... The Tribunal could be granted a wider discretion to determine its procedure so that it was able to being to bear its specialist experience of environmental issues in the most effective way” Lord Woolf pointed out the need for “a multi-faceted, multi-skilled body which would combine the services provide by existing Courts, Tribunals and Inspectors in the environmental field. it would be a ‘one stop shop’, which should lead to faster, cheaper and the more effective resolution of disputes in the environmental area. It would avoid increasing the load on already overburdened lay institutions by trying to compel them to resolve issues with which they are not designed to deal. It could be a forum in which the Judges could play a different role. A role which enabled them not to examine environmental problems with limited vision. It would however be based on our existing experience, combining the skills of the existing inspectorate, the Land Tribunal and other administrative bodies. It could be an exciting project.” According to Lord Woolf, “while environmental law is now clearly a permanent feature of the legal scene, it still lacks clear boundaries.” It might be “preferable that the boundaries are left to be established by Judicial decision as the law developed. After all, the great strength of the English Law has been its pragmatic approach”. Further, where urgent decisions are required, there are often no easy options for preserving the status quo pending the resolution of the dispute. If the project is allowed to go ahead, there may be irreparable damage to the environment; if it is stopped, there may be irreparable damage to an important economic interest. (See Environment Enforcement : The need for a specialised court - by Robert Cranworth QC (Jour of Planning and Environment, 1992 p. 798 at 806). Robert Cranworth advocates the constitution of a unified tribunal with a simple procedure which looks to the need of customers, which takes the form of a Court or an expert panel, the allocation of a procedure adopted to the needs of each case - which would operate at two levels - first tier by a single Judge or technical person and a review by a panel of experts presided over by a High Court Judge - and not limited to ‘Wednesbury’ grounds.

23. In the USA the position is not different. It is accepted that when the adversary process yields conflicting testimony on complicated and unfamiliar issues and the participants cannot fully understand the nature of the dispute, Courts may not be competent to make reasoned and principled decision. Concern over this problem led



the Carnegie Commission of Science and Technology (1993) and the Government to undertake a study of the problems of science and technology in Judicial decision making. In the introduction to its final report, the Commission concluded :

“The Courts’ ability to handle complex science-rich cases has recently been called into question, with widespread allegations that the Judicial system is increasingly unable to manage and adjudicate science and technology (S&T) issues. Critics have objected that Judges cannot make appropriate decisions because they lack technical training, that the Jurors do not comprehend the complexity of the evidence they are supposed to analyze, and that the expert witnesses on whom the system relies are mercenaries whose biased testimony frequently produces erroneous and inconsistent determinations. If these claims go unanswered, or are not dealt with, confidence in the Judiciary will be undermined as the public becomes convinced that the Courts as now constituted are incapable of correctly resolving some of the more pressing legal issues of our day.”

The uncertain nature of scientific opinions :

24. In the environment field, the uncertainty of scientific opinions has created serious problems for the Courts. In regard to the different goals of Science and the law in the ascertainment of truth, the U.S. Supreme Court observed in *Daubert v. Merrel Dow Pharmaceuticals Inc.*, (1993) 113 S.Ct 2786, as follows :

“..... there are important differences between the quest for truth in the Court-room and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly.”

25. It has also been stated by Brian Wynne in ‘Uncertainty and Environment Learning, (2. Global Env'tl. Change 111) (1992) :

“Uncertainty, resulting from inadequate data, ignorance and indeterminacy, is an inherent part of science.”

Uncertainty becomes a problem when scientific knowledge is institutionalised in policy making or used as a basis for decision-making by agencies and courts. Scientists may refine, modify or discard variables or models when more information is available; however, agencies and Courts must make choices based on existing scientific knowledge. In addition, agency decision making evidence is generally presented in a scientific form that cannot be easily tested. Therefore, inadequacies in the record due to uncertainty or insufficient knowledge may not be properly considered. (The Status of the Precautionary Principle in Australia : by Charmian Barton (Vol. 22) (1998) (Harv. Env'tl. Law Review p. 509 at pp 510-511).

26. The inadequacies of science result from identification of adverse effects of a hazard and then working backwards to find the causes. Secondly, clinical tests are performed, particularly where toxins are involved, on animals and not on humans, that is to say, are based on animal studies or short-term cell testing. Thirdly conclusions based on epidemiological studies are flawed by the scientist’s inability to control or even accurately assess past exposure of the subjects. Moreover, these studies do not permit the scientist to isolate the effects of the substance of concern. The latency period of many carcinogens and other toxins exacerbates problems of later interpretation. The timing between exposure and observable effect creates intolerable delays before regulation occurs. (See *Scientific Uncertainty in Protective Environmental Decision making* - by Alyson C. Flourney (Vol. 15) 1991 Harv. Env'tl. Law Review P. 327 at 333-335). It is the above uncertainty of science in the environmental context, that has led International Conferences to formulate new legal theories and rules of evidence. We shall presently refer to them. The Precautionary Principle and the new Burden of Proof - The Vellore Case :

27. The ‘uncertainty’ of scientific proof and its changing frontiers from time to time has led to great changes in environment concepts during the period between the Stockholm Conference of 1972 and the Rio Conference of 1992. In *Vellore Citizens’ Welfare Forum v. Union of India and others*, 1995(5) SCC 647, a three Judges Bench of this Court referred to these changes, to the ‘precautionary principle’ and the new concept of ‘burden of proof’ in environmental matters. Kuldip Singh, J. after referring to the principles evolved in various international Conferences and to the concept of ‘Sustainable Development’, stated that the Precautionary Principle, the Polluter Pays Principle and the special concept of Onus of Proof have now emerged and govern the law in our country too, as is clear from Articles 47, 48-A and 51-A(g) of our Constitution and that, in fact, in the various environmental statutes, such as the Water Act, 1974 and other statutes, including the Environment (Protection) Act, 1986, these concepts are already implied. The learned Judge declared that these principles have now become part of our law. The relevant observations in the Vellore case in this behalf read as follows :

“In view of the above-mentioned constitutional and statutory provisions we have no hesitation in holding that the Precautionary Principle and the Polluter Pays Principle are part of the environmental law of the country.”

The Court observed that even otherwise the above-said principles are accepted as part of the Customary International Law and hence there should be no difficulty in accepting them as part of our domestic law. In fact on the facts of the case before this Court, it was directed that

the authority to be appointed under section 3(3) of the Environment (Protection) Act, 1986

“shall implement the ‘Precautionary Principle’ and the ‘Polluter Pays Principle’.”

The learned Judges also observed that the new concept which places the Burden of Proof on the Developer or Industrialist who is proposing to alter the status quo, has also become part of our environmental law.

28. The Vellore judgment has referred to these principles briefly but, in our view, it is necessary to explain their meaning in more detail, so that Courts and tribunals or environmental authorities can properly apply the said principles in the matters which come before them. The Precautionary Principle replaces the Assimilative Capacity Principle :

29. A basic shift in the approach to environmental protection occurred initially between 1972 and 1982. Earlier the Concept was based on the ‘assimilative capacity’ rule as revealed from Principle 6 of the Stockholm Declaration of the U.N. Conference on Human Environment, 1972. The said principle assumed that science could provide policy-makers with the information and means necessary to avoid encroaching upon the capacity of the environment to assimilate impacts and it presumed that relevant technical expertise would be available when environmental harm was predicted and there would be sufficient time to act in order to avoid such harm. But in the 11th Principle of the U.N. General Assembly Resolution on World Charter for Nature, 1982, the emphasis shifted to the ‘Precautionary Principle’, and this was reiterated in the Rio Conference of 1992 in its Principle 15 which reads as follows :

“Principle 15 : In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage; lack of full scientific certainty shall not be used as a reason for proposing cost-effective measures to prevent environmental degradation.”

30. In regard to the cause for the emergence of this principle, Charmian Barton, in the article earlier referred to in Vol. 22, Harv. Entt. L.Rev. (1998) p. 509 at (p. 547) says :

“There is nothing to prevent decision makers from assessing the record and concluding there is inadequate information on which to reach a determination. If it is not possible to make a decision with “some” confidence, then it makes sense to err on the side of caution and prevent activities that may cause serious or irreversible harm. An informed decision can be made at a later stage when additional data is available or resources permit further research. The ensure that greater caution is taken in environmental management,

implementation of the principle through Judicial and legislative means is necessary.”

In other words, inadequacies of science is the real basis that has led to the Precautionary Principle of 1982. It is based on the theory that it is better to err on the side of caution and prevent environmental harm which may indeed become irreversible.

31. The principle of precaution involves the anticipation of environmental harm and taking measures to avoid it or to choose the least environmentally harmful activity. It is based on Scientific uncertainty. Environmental protection should not only aim at protecting health, property and economic interest but also protect the environment for its own sake. Precautionary duties must not only be triggered by the suspicion of concrete danger but also by (justified) concern or risk potential. The precautionary principle was recommended by the UNEP Governing Council (1989). The Bomako Convention also lowered the threshold at which scientific evidence might require action by not referring to “serious” or “irreversible” as adjectives qualifying harm. However, summing up the legal status of the precautionary principle, one commentator characterised the principle as still “evolving” for though it is accepted as part of the international customary law, “the consequences of its application in any potential situation will be influenced by the circumstances of each case.” (See First Report of Dr. Sreenivasa Rao Pemmaraju, Joint Secretary and Legal Adviser, Ministry of External Affairs, New Delhi. Special - Rapporteur, International Law Commission dated 3.4.1998 paras 61 to 72). The Special Burden of Proof in Environment cases :

33. We shall next elaborate the new concept of burden of proof referred to in the Vellore case at p. 658 (1996(5) SCC 647). In that case, Kuldip Singh, J. stated as follows:

“The ‘onus of proof’ is on the actor or the developer/industrialist to show that his action is environmentally benign.”

“The ‘onus of proof’ is on the action or the developer/industrialist to show that his action is environmentally benign.”

32. It is to be noticed that while the inadequacies of science have led to the ‘precautionary principle’, the said ‘precautionary principle’ in its turn, has led to the special principle of burden of proof in environmental cases where burden as to the absence of injurious effect of the actions proposed, is placed on those who want to change the status quo (Wynne, Uncertainty and Environmental Learning, 2 Global Env'tl. Change 121 (1992) at p. 123). This is often termed as a reversal of the burden of proof, because otherwise in environmental cases, those opposing the change would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party attempting to preserve the status quo by maintaining a less-polluted state should not carry

the burden of proof and the party who wants to alter it, must bear this burden. (See James M. Olson, *Shifting the Burden of Proof*, 20 *Env'tl. Law* p. 891 at 898 (1990). (Quoted in Vol. 22 (1998) *Harv. Env. Law Review* p. 509 at 519, 550).

34. The precautionary principle suggested that where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution in major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment. (See Report of Dr. Sreenivasa Rao Pemmaraju, Special Rapporteur, International Law Commission, dated 3.4.1998, para 61).

35. It is also explained that if the environmental risks being run by regulatory in action are in some way “uncertain but non-negligible”, then regulatory action is justified. This will lead to the question as to what is the ‘non-negligible risk’. In such a situation, the burden of proof is to be placed on those attempting to alter the status quo. They are to discharge this burden by showing the absence of a ‘reasonable ecological or medical concern’. That is the required standard of proof. The result would be that if insufficient evidence is presented by them to alleviate concern about the level of uncertainty, then the presumption should operate in favour of environmental protection. Such a presumption has been applied in *Ashburton Acclimatisation Society v. Federated Farmers of New Zealand*, 1988(1) NZLR 78. The required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a ‘reasonable persons’ test. (See *Precautionary Principle in Australia* by Charmian Barton) (Vol. 22) (1998) *Harv. Env. L.Rev.* 509 at 549). Brief Survey of Judicial and technical inputs in environmental appellate authorities/tribunals :

36. We propose to briefly examine the deficiencies in the Judicial and technical inputs in the appellate system under some of our existing environmental laws. Different statutes in our country relating to environment provide appeals to appellate authorities. But most of them still fall short of a combination of judicial and scientific needs. For example, the qualifications of the persons to be appointed as appellate authorities under section 28 of the Water (Prevention and Control of Pollution) Act, 1974, section 31 of the Air (Prevention and Control of Pollution) Act, 1981, under Rule 12 of the Hazardous Wastes (Management and Handling) Rules, 1989 are not clearly spelled out. While the appellate authority under section 28 in Andhra Pradesh as per the notification of the Andhra Pradesh Government is a retired High Court Judge and there is nobody on his panel to help him in technical matters, the same authority as per the notification in Delhi is the Financial Commissioner (see notification dated 18.2.19920 resulting in there being in NCT neither a regular judicial member nor a technical one. Again, under the National Environmental Tribunal Act, 1995, which has power to award compensation for death or injury to any

person (other than workmen), the said Tribunal under section 10 no doubt consists of a Chairman who could be a Judge or retired Judge of the Supreme or High Court and a Technical Member. But section 10(1)(b) read with section 10(2)(b) or (c) permits a Secretary to Government or Additional Secretary who has been a Vice-Chairman for 2 years to be appointed as Chairman. We are citing the above as instances of the grave inadequacies. Principle of Good Governance : Need for modification of our statutes, rules and notifications by including adequate Judicial and Scientific inputs :

37. Good Governance is an accepted principle of international and domestic law. it comprises of the rule of law, effective State institutions, transparency and accountability in public affairs, respect for human rights and the meaningful participation of citizens - (including scientists) - in the political processes of their countries and in decisions affecting their lives. (Report of the Secretary General on the work of the Organization, Official records of the UN General Assembly, 52 session, Suppl. I (A/52/1) (para 22). It includes the need for the State to take the necessary ‘legislative, administrative and other actions’ to implement the duty of prevention of environmental harm, as noted in Article 7 of the draft approved by the Working Group of the International Law Commission in 1996. (See Report of Dr. Sreenivasa Rao Pemmaraju, Special Rapporteur of the International Law Commission dated 3.4.1998 on ‘Prevention of transboundary damage from hazardous activities’) (paras 103, 104). Of paramount importance, in the establishment of environmental Courts, Authorities and Tribunals is the need for providing adequate Judicial and scientific inputs rather than leave complicated disputes regarding environmental pollution to officers drawn only from the Executive.

38. It appears to us from what has been stated earlier that things are not quite satisfactory and there is an urgent need to make appropriate amendments so as to ensure that at all times, the appellate authorities or tribunals consist of Judicial and also Technical personnel well versed in environmental laws. Such defects in the constitution of these bodies can certainly undermine the very purpose of those legislations. We have already referred to the extreme complexity of the scientific or technology issues that arise in environmental matters. Nor, as pointed out by Lord Woolf and Robert Cranworth, should the appellate bodies be restricted to Wednesbury limitations.

39. The Land and Environment Court of New South Wales in Australia, established in 1980, could be the ideal. It is a superior Court of record and is composed of four Judges and nine technical and conciliation assessors. Its jurisdiction combines appeal, judicial review and enforcement functions. Such a composition in our opinion is necessary and ideal in environmental matters.

40. In fact, such an environmental Court was envisaged by this Court atleast in two judgments. As long back as

1986, Bhagwati, CJ. in *M.C. Mehta v. Union of India and Shriram Foods and Fertilizers Case*, 1986(2) SCC 175 (at page 202) observed :

“We would also suggest to the Government of India that since cases involving issues of environmental pollution, ecological destructions and conflicts over national resources are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, it might be desirable to set up Environmental Courts on the 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 the expertise required for its adjudication. There would of course be a right of appeal to this Court from the decision of the Environment Court.”

In other words, this Court not only contemplated a combination of a Judge and Technical Experts but also an appeal to the Supreme Court from the Environmental Court.

41. Similarly, in the *Vellore case*, 1996(5) SCC 647, while criticising the inaction on the part of Government of India in the appointment of an authority under section 3(3) of the Environment (Protection) Act, 1986. Kuldip Singh, J. observed that the Central Government should constitute an authority under section 3(3) : “headed by a retired judge of the High Court and it may have other members - preferably with expertise in the field of pollution control and environmental protection - to be appointed by the Central Government.” We have tried to find out the result of the said directions. We have noticed that pursuant to the observations of this Court in *Vellore case*, certain notifications have been issued by including a High Court Judge in the said authority. In the notification So.671(E) dated 30.9.1996 issued by the Government of India for the State of Tamil Nadu under Section 3(3) of the 1986 Act, appointing a ‘Loss of Ecology (Prevention and Payment of Compensation) authority, it is stated that it shall be manned by a retired High Court Judge and other technical members who would frame a scheme or schemes in consultation with NEERI etc. It could deal with all industries including tanning industries. A similar notification So. 704E dated 9.10. 1996 was issued for the ‘Environmental Impact Assessment Authority’ for the NCT including a High Court Judge. Notification dated 6.2.1997 (No. 88E) under section 3(3) of the 1986 Act dealing with shrimp industry, of course, includes a retired High Court Judge and technical persons.

42. As stated earlier, the Government of India should, in our opinion, bring about appropriate amendments in the environmental statutes, Rules and notification to ensure that in all environmental Courts, Tribunals and appellate authorities there is always a Judge of the rank of a High Court Judge or a Supreme Court Judge, - sitting or retired - and Scientist or group of Scientists of high ranking and experience so as to help a proper and fair adjudication of

disputes relating to environment and pollution.

43. There is also an immediate need that in all the States and Union Territories, the appellate authorities under section 28 of the Water (Prevention of Pollution) Act, 1974 and section 31 of the Air (Prevention of Pollution) Act, 1981 or other rules there is always a Judge of the High Court, sitting or retired and a Scientist or group of Scientists of high ranking and experience, to help in the adjudication of disputes relating to environment and pollution. An amendment to existing notifications under these Act can be made for the present.

44. There is also need for amending the notifications issued under Rule 12 of the Hazardous Wastes (Management and Handling) Rules, 1989. What we have said applies to all other such Rules or notifications issued either by the Central Government or the State Governments. We request the Central and State Governments to take notice of these recommendations and take appropriate action urgently.

45. We finally come to the appellate authority under the National Environment Appellate Authority Act, 1997. In our view it comes very near to the ideals set by this Court. Under that statute, the appellate authority is to consist of a sitting or retired Supreme Court Judge or a sitting or retired Chief Justice of a High Court and a Vice-Chairman who has been an administrator of high rank with expertise in technical aspects of problems relating to environment; and Technical Members, not exceeding three, who have professional knowledge or practical experience in the areas pertaining to conservation, environmental management, land or planning and development. Appeals to this appellate authority are to be preferred by persons aggrieved by an order granting environmental clearance in the areas in which any industries, operations or processes etc. are to be carried or carried subject to safeguards. 46. As stated above and we reiterate that there is need to see that in the appellate authority under the Water (Prevention of Pollution) Act, 1974, the Air (Prevention of Pollution) Act, and the appellate authority under Rule 12 of the Hazardous Wastes (Management and Handling) Rules, 1989, under the notification issued under Section 3(3) of the Environment (Protection) Act, 1986 for National Capital Territory and under section 10 of the National Environment Tribunal Act, 1995 and other appellate bodies, there are invariably Judicial and Technical Members included. This Court has also observed in *M.C. Mehta v. Union of India and Shriram Foods and Fertilizers Case*, 1986(2) SCC 176 (at 262) that there should be a right of regular appeal to the Supreme Court, i.e. an appeal incorporated in the relevant statutes. This is a matter for the Governments concerned to consider urgently, by appropriate legislation whether plenary or subordinate or by amending the notifications. The duty of the present generation towards posterity : Principle of Inter-generational Equity : Rights of the Future against the Present :

47. The principle of Inter-generational equity is of recent origin. The 1972 Stockholm Declaration refers to it in principles 1 and 2. In this context, the environment is viewed more as a resource basis for the survival of the present and future generations. Principle 1 states :

“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations .....

Principle 2 :

“The natural resources of the earth, including the air, water, lands, flora and fauna and especially representative samples of natural ecosystems, must be safeguards for the benefit of present and future generations through careful planning or management, as appropriate.”

Several international conventions and treaties have recognised the above principles and in fact several imaginative proposals have been submitted including the locus standi of individuals or groups to take out actions as representatives of future generations, or appointing Ombudsman to take of the rights of the future against the present (proposals of Sands and Brown Weiss referred to by Dr. Sreenivasa Rao Pemmaraju, Special Rapporteur, paras 97, 98 of his report). Whether the Supreme Court while dealing with environmental matters under Article 32 or Article 136 or High Courts under Article 226 can make reference to the National Environmental Appellate Authority under the 1997 Act for investigation and opinion :

48. In a large number of matters coming up before this Court either under Article 32 or under Article 136 and also before the High Courts under Article 226, complex issues relating to environment and pollution, science and technology have been arising and in some cases, this Court has been finding sufficient difficulty in providing adequate solutions to meet the requirements of public interest, environmental protection, elimination of pollution and sustained development. In some cases this Court has been referring matters to professional or technical bodies. The monitoring of a case as it progresses before the professional body and the consideration of objections raised by affected parties to the opinion given by these professional technical bodies have again been creating complex problems. Further these matters some time require day to day hearing which, having regard to other workload of this Court, (a factor mentioned by Lord Woolf) it is not always possible to give urgent decision. In such a situation, this Court has been feeling the need for an alternative procedure which can be expeditious and scientifically adequate. Question is whether, in such a situation, involving grave public interest, this Court could seek the help of other statutory bodies which have an adequate combination of both Judicial and technical expertise in environmental matters, like the

Appellate Authority under the National Environmental Appellate Authority Act, 1997 ?

49. A similar question arose in *Paramjit Kaur v. State of Punjab*, 1998(5) SCALE 219 : 1998(6) J.T. 338, decided by this Court on 10.9.1998. In that case, initially, W. Petitions (Crl.) No. 447 and 497 of 1995 were filed under Article 32 of the Constitution of India alleging flagrant violations of human rights in the State of Punjab as disclosed by a CBI report submitted to this Court. This Court felt the need to have these allegations investigated by an independent body. This Court then passed an order on 12.12.96 requesting the National Human Rights Commission to examine the matter. The said Commission is headed by a retired Chief Justice of India and other expert Members. After the matter went before the said Commission, various objections were raised as to its jurisdiction. It was also contended that if these issues were to be otherwise inquired into by the Commission upon a complaint, they would have stood time barred. These objections were rejected by the Commission by an elaborate order on 4.8.1997 holding that once the Supreme Court referred the matters to the Commission, it was acting *sui Juris*, that its services could be utilised by the Supreme Court treating the Commission as an instrumentality or agency of the Supreme Court, that the period of limitation under the Protection of Human Rights Act, 1993 would not apply, that in spite of the reference to the Commission, the Supreme Court would continue to have seisin of the cases and any determination by the Commission, wherever necessary or appropriate, would be subject to the approval of the Supreme Court.

50. Not satisfied with the above order of the Commission, the Union of India filed clarification application Crl.M.P. No. 6674 of 1997 etc. This Court then passed the order aforementioned in *Paramjit Kaur v. State of Punjab*, 1998(5) SCALE 219 : 1998(6) J.T. 332 (SC) on 12.12.1998 accepting the reasons given by the Commission in rejecting the objections. In that context, this Court held that (i) the Commission was an expert body consisting of experts in the field (ii) if this Court could also request the expert body to investigate or look into the allegations, unfettered by any limitations in the Protection of Human Rights Act, 1993, (iii) that by so referring the matters to the Commission, this Court was not conferring any new jurisdiction on the Commission, and (iv) that the Commission would be acting only in aid of this Court. In our view, the above procedure in *Paramjit Kaur v. State of Punjab* is equally applicable in the case before us for the following reasons.

51. Environmental concerns arising in this Court under Article 32 or under Article 136 or under Article 226 in the High Courts are, in our view, of equal importance as Human Rights concerns. In fact both are to be traced to Article 21 which deals with fundamental right to life and liberty. While environmental aspects concern ‘life’, human rights aspects concern ‘liberty’. In our view, in the context of

emerging jurisprudence relating to environmental matters, - as it is the case in matters relating to human rights, - It is the duty of this Court to render Justice by taking all aspects into consideration. With a view to ensure that there is neither danger to environment nor to ecology and at the same time ensuring sustainable development, this Court in our view, can refer scientific and technical aspects for investigation and opinion to expert bodies such as the Appellate Authority under the National Environmental Appellate Authority Act, 1997. The said authority comprises of a retired Judge of the Supreme Court and Members having technical expertise in environmental matters whose investigation, analysis of facts and opinion, on objections raised by parties, could give adequate help to this Court or the High Courts and also the needed reassurance. Any opinions rendered by the said authority would of course be subject to the approval of this Court. On the analogy of Paramjit Kaur's case, such a procedure, in our opinion, is perfectly within the bounds of the law. Such a procedure, in our view, can be adopted in matters arising in this Court under Article 32 or under Article 136 or arising before the High Courts under Article 226 of the Constitution of India. The order of reference :

52. After the above view was expressed to counsel on both sides, certain draft issues were prepared for reference. There was some argument that some of the draft issues could not be referred to the Commission while some others required modification. After hearing arguments, parties on both sides agreed for reference of the following issues to the Appellate Authority under the National Environmental Appellate Authority Act, 1997.

53. We shall now set out these issues. They are : (a) Is the respondent industry a hazardous one and what is its pollution potentiality, taking into account, the nature of the product, the effluents and its location ? (b) Whether the operation of the industry is likely to affect the sensitive catchment area resulting in pollution of the Himayat Sagar and Osman Sagar lakes supplying drinking water to the twin cities of Hyderabad and Secunderabad ?

54. We may add that it shall be open to the authority to inspect the premises of the factory, call for documents from the parties or any other body or authority or from the Government of Andhra Pradesh or Union Government and to examine witnesses, if need be. The Authority shall also have all powers for obtaining data or technical advice as it may deem necessary from any source. It shall give an opportunity to the parties or their counsel to file objections and lead such oral evidence or produce such documentary evidence as they may deem fit and shall also give a hearing to the appellant or its counsel to make submissions.

55. A question has been raised by the respondent industry that it may be permitted to make trial runs for

atleast three months so that the results of pollution could be monitored and analysed. This was opposed by the appellant and the private respondent. We have not thought it fit to go into this question and we have informed counsel that this issues could also be left to the said Authority to decide because we do not know whether any such trial runs would affect the environment or cause pollution. On this aspect also, it shall be open to the authority to take a decision after hearing the parties.

56. Parties have requested that the authority may be required to give its opinion as early as possible. We are of the view that the Authority could be requested to give its opinion within a period of three months from the date of receipt of this order. We, therefore, refer the above issues to the above-said Appellate Authority for its opinion and request the Authority to give its opinion, as far as possible, within the period above-mentioned. If the Authority feels any further clarifications or directions are necessary from this Court, it will be open to it to seek such clarifications or directions from this Court.

57. The Company shall make available photo copies of the paper books filed in this Court or other papers filed in the High Court or before the authority under Section 28 of the Water Act, 1974, for the use of the Appellate Authority.

58. The Registry shall communicate a copy of this order to the Appellate Authority under the National Environmental Appellate Authority Act, 1997. Matter may be listed before us after three months, as part-heard. Ordered accordingly.

59. In the context of recommendations made for amendment of the environmental laws and rules by the Central Government and notifications issued by the Central and State Governments, we direct copies of this judgment to be communicated to the Secretary, Environment and Forests (Government of India), New Delhi, to the Secretaries of Environment and Forests in all State Governments and Union Territories, and to the Central Pollution Control Board, New Delhi. We further direct the Central Pollution Control Board to communicate a copy of this judgment to all State Pollution Control Boards and other authorities dealing with environment, pollution, ecology and forest and wildlife. The State Governments shall also take steps to communicate this judgment to their respective State Pollution Control Boards and other authorities dealing with the above subjects - so that appropriate action can be taken expeditiously as indicated in this judgment.

Chawla Publications (P) Ltd, Chandigarh, India  
Revised: March 15, 1999



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**NARMADA BACHAO ANDOLAN – *Petitioner***

**VS**

**UNION OF INDIA AND OTHERS – *Respondents***

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5. CORAM: DR. A.S. ANAND, CJI., S.P. BHARUCHA AND B.N. KIRPAL, JJ PUBLIC INTEREST LITIGATION - CONSTITUTION - ARTICLE 21 AND 32 - ENVIRONMENT (PROTECTION) ACT, 1986 - SECTION 3 - NARMADA DAM - PIL filed challenging the construction of the Narmada Dam-Environmental clearance granted by the Prime Minister in 1987 - Plea for appointment of independent experts

10 -Whether the environmental clearance granted by the Union of India has been granted without proper study and understanding of the environmental impact of the project and whether the environmental conditions imposed by the Ministry of Environment have been violated and if so, what is the legal effect of the violations - Dismissing the petition, Held,

**15 per Kirpal, J. (for himself and CJI.).**

A1. From the documents and the letters referred to hereinabove, it is more than evident that the Government of India was deeply concerned with the environmental aspects of the Narmada Sagar and Sardar Sarovar Project. Inasmuch as there was some difference of opinion between the Ministries of Water Resources and Environment & Forests with regard to the grant of environmental clearance, the matter was referred to the Prime Minister. Thereafter, series of discussions took place in the Prime Minister's Secretariat and the concern of the Prime Minister with regard to the environment and desire to safeguard the interest of the tribals resulted in some time being taken. The Prime Minister gave environmental clearance on 13th April, 1987 and formal letter was issued thereafter on 24th June, 1987. (para 88).

A2. It is not possible, in view of the aforesaid state of affairs, for this Court to accept the contention of the petitioner that the environmental clearance of the project was given without application of mind. It is evident, and in fact this was the grievance made by ShriVagheia, that the environmental clearance of the project was unduly delayed. The Government was aware of the fact that number of studies and data had to be collected relating to environment. Keeping this in mind, a conscious decision was taken to grant environmental clearance and in order to ensure that environmental management plans are implemented par passu with engineering and other works, the Narmada Management Authority was directed to be constituted. (Para 89).

A3. There is no reason whatsoever as to why independent experts should be required to examine the quality, accuracy, recommendations and implementation of the studies carried out. The Narmada Control Authority

and the Environmental Sub-group in particular have the advantage of having with them the studies which had been carried out and there is no reason to believe that they would not be able to hand any problem, if and when, it arises or to doubt the correctness of the studies made. (Para 100).

A4. The clearance of June, 1987 required the work to be done *pari passu* with the construction of the dams and the filling of the reservoir. The area wherein the rainfall water is collected and drained into the river or reservoir is called catchment area and the catchment area treatment was essentially aimed at checking of soil erosion and minimising the silting in the reservoir within the immediate vicinity of the reservoir in the catchment area. The respondents had proceeded on the basis that the requirement in the letter of June, 1987 that catchment area treatment programme and rehabilitation plans be drawn up and completed ahead of reservoir filling would imply that the work was to be done *pari passu*, as far as catchment area treatment programme is concerned, with the filling of reservoir. Even though the filling of the reservoir started in 1994, the impoundment Award was much less than the catchment area treatment which had been affected. The status of compliance with respect *pari passu* conditions indicated that in the year 1999, the reservoir level was 88.0 meter, the impoundment area was 6881 hectares (19%) and the area where catchment treatment had been carried out was 128230 hectares being 71.56% of the total work required to be done. The Minutes of the Environmental Sub-group as on 28th September, 1999 stated that catchment areas treatment works were nearing completion in the states of Gujarat and Maharashtra. Though, there was some slippage in Madhya Pradesh, however, overall works by the large were on schedule. This clearly shown that the monitoring of the catchment treatment plan was being done by the Environmental Sub-group quite effectively. (Para 102).

A5. In the present case we are not concerned with the polluting industry which is being established. What is being constructed is a large dam. The dam is neither a nuclear establishment nor a polluting industry. The construction of a dam undoubtedly would result in the change of environment but it will not be correct to presume that the construction of a large dam like the Sardar Sarovar will result in ecological disaster. India has an experience of over 40 years in the construction of dams. The experience does not show that construction of a large dam is not cost effective or leads to ecological or environmental degradation. On the contrary there has been ecological upgradation with the construction of large dams. What is the impact on environment with the construction of a dam is well-known in India and, therefore, the decision in A.P.

Pollution Control Board's case (*supra*) will have no application in the present case. (Para 121).

A6. In India notification had been issued under Section 3 of the Environmental Act regarding prior environmental clearance in the case of undertaking of projects and setting up of industries including Inter-State River Project. This notification has been made effective from 1994. There was, at the time when the environmental clearance was granted in 1987, no obligation to obtain any statutory clearance. The environmental clearance which was granted in 1987 was essentially administrative in nature, having regard and concern of the environment in the region. Change in environment does not per se violate any right under Article 21 of the Constitution of India especially when ameliorative steps are taken not only to preserve but to improve ecology and environment and in case of displacement, prior relief and rehabilitation measures take place *pari passu* with the construction of the dam. (Para 123).

A7. At the time when the environmental clearance was granted by the Prime Minister whatever studies were available were taken into consideration. It was known that the construction of the dam would result in submergence and the consequent effect which the reservoir will have on the ecology of the surrounding areas was also known. Various studies relating to environmental impact, some of which have been referred to earlier in this judgement, had been carried out. There are different facets of environment and if in respect of a few of them adequate data was not available it does not mean that the decision taken to grant environmental clearance was in any way vitiated. The clearance required further studies to be undertaken and we are satisfied that this has been and is being done. Care for environment is an on going process and the system in place would ensure that ameliorative steps are taken to counter the adverse effect, if any, on the environment with the construction of the dam. (Para 124).

A8. Furthermore environment concern has not only to be of the area which is going to be submerged and its surrounding area. The impact on environment should be seen in relation to the project as a whole. While an area of land will submerge but the construction of the Dam will result in multifold improvement in the environment of the areas where the canal waters will reach. Apart from bringing drinking water within easy reach the supply of water to Rajasthan will also help in checking the advancement of the Thar Desert. Human habitation will increase there which, in turn, will help in protecting the so far porous border with Pakistan. (Para 232).

A9. Environmental and ecological consideration must, of course, be given due consideration but with proper channellisation of developmental activities ecology and environment can be enhanced. For example, Periyar Dam Reservoir has become an elephant sanctuary with thick green forests all round while at the same time wiped out families that used to haunt the district of Madurai in Tamil

Nadu before its construction. Similarly Krishnarajasagar Dam which has turned the Mandya district which was once covered with shrub forests with wild beasts into a prosperous one with green paddy and sugarcane fields all round. (Para 239).

A10. So far a number of such river valley projects have been undertaken in all parts of India. The petitioner has not been able to point out a single instance where the construction of a Dam has, on the whole, had an adverse environmental impact. On the contrary the environment has improved. That being so there is not reason to suspect, with all the experience gained so far, that the position here will be any different and there will not be overall improvement and prosperity. It should not be forgotten that poverty is regarded as one of the causes of degradation of environment. With improved irrigation system the people will prosper. The construction of Bhakra Dam is a shining example for all to see how the backward areas of erstwhile undivided Punjab has now become the granary of India with improved environment than what was there before the completion of the Bhakra Nangal project. (Para 240).

A11. It appears, that, though it ought rightly to have been taken by the Ministry of Environment and Forests, the decision whether or not to accord environmental clearance to the Project was left to the Prime Minister. (Para 256).

A12. Even in 1987, when the environment clearance to the Project was given, it had been found necessary by the Union of India to rigorously assess the environmental impact of river valley projects. This was to determine whether the uniqueness of the natural resources, like wildlife, flora and the genetic pool in the region, demanded its exclusive earmarking for that purpose, in which event the river valley project would not be accorded clearance. Even otherwise, it was imperative to consider the Project's environmental aspects, such as its effect on health, plant genetic resources, aquatic resources, water logging and salinity or irrigated soils, deforestation and soil conservation. Its short and long term impact on population, on flora and fauna, on wildlife, on national parks and sanctuaries, on historical, cultural and religious monuments, on forests, agriculture, fisheries and recreation and tourism had to be taken in account. Field surveys were necessary for generating the requisite data for the impact assessment. The cost of the proposed remedial and mitigated measures had to be included in the project cost. The necessary data that was required to be collected for the purposes of the assessment of a project's environmental impact was set out in Guidelines for the purpose issued by the Ministry of Environment and Forests of the Union Government. (Para 263).

A13. The contemporaneous Notes prepared by the Ministry of Water Resources and the Ministry of Environment and Forests, also referred to above, leave no manner of doubt that the requisite data for assessment of the environmental impact of the Project was not available

when the environmental clearance thereof was granted. In the words of one of the Notes, “While some plans have been made, studies undertaken and action initiated, it will be clear from the preceding paragraphs that much still remains to be done. Indeed it is the view of the Ministry of Environment, Forests and Wildlife that what has been done so far whether by way of action or by way of studies does not amount to much and that many matters are yet in the early and preliminary stages”. The Notes make clear that the studies, censuses, mapping of areas and filed surveys for the collection of data for assessment of the environmental impact of the Project were likely to take a further 2 to 3 years. An environmental clearance based on next to no data in regard to the environmental impact of the Project was contrary to the terms of the then policy of the Union of India in regard to environmental clearances and, therefore, no clearance at all. (Para 264).

A14. The environmental clearance of 24th June, 1987 stated that details had been sought from the Project authorities in respect of the rehabilitation master plan, phased catchment areas treatment scheme, compensatory afforestation plan, Command area development, survey of flora and fauna, carrying capacity of surrounding area, seismicity and health aspects; field surveys had yet to be completed and complete details had been assured by 1989. Clearly, therefore, the necessary particulars in regard to the environmental impact of the Project, as required by the Guidelines, were not available when the environmental clearance was given, and it, therefore, could not have been given. (Para 265).

A15. The conditions upon which the environmental clearance was given were that detailed surveys and studies would be carried out and the Narmada Control Authority, whose terms of reference had been amplified, would ensure that “environmental safeguard measures” were planned and implemented *pari passu* with the progress of work on the Project. No further assessment of the environmental impact of the Project was contemplated by the environmental clearance, nor, indeed was it ever carried out. (Para 266).

A16. What the environmental safeguards measures the Narmada Control Authority was to ensure were, and what their costs would be, was not known when the environmental clearance was given. There was, therefore, no way in which this cost could be included in the cost of the Project, which was a requirement of the Guidelines. (Para 266).

A17. While the environmental safeguard measures were to be planned and implemented *pari passu* with the progress of the work on the Project, the catchment area treatment programme and the rehabilitation plans were required to be “so drawn as to be completed a head of reservoir filling.” This condition clearly required that before any water was impounded in the reservoir the catchment area treatment programme was not only to be drawn but also to be completed; so also the rehabilitation plans. If, as the Project

authorities interpreted this clause, only the drawing of the catchment area treatment programme and the rehabilitation plans were to be completed ahead of impoundment in the reservoir. This, plainly, was intended to off set, so far as was possible in the circumstances, the adverse effect of the impoundment of water in the reservoir upon the catchment and those who were required to be settled elsewhere. In fact, the impoundment began much before. (Para 268).

A18. The fact that the environmental clearance was given by the Prime Minister and not by the Ministry of Environment and Forests, as it would ordinarily have been done, makes no difference at all. Under its own policy, as indicated by the Guidelines, the Union of India was bound to give environmental clearance only after **a)** all the necessary data in respect of the environmental impact of the Project and had been collected and assessed; **b)** the assessment showed that the Project could proceed; and **c)** the environmental safeguard measures, and their cost, had been worked out. (Para 270).

A19. An adverse impact on the environment can have disastrous consequences for this generation and generations to come. This Court has in its judgements on Article 21 of the Constitution recognised this. This Court cannot place its seal of approval on so vast an undertaking as the Project without first ensuring that those best fitted to do so have had the opportunity of gathering all necessary data on the environmental impact of the project and of assessing it. They must then decide if environmental safeguard measures have to be adopted, and their cost. While surveys and studies on the environmental aspects of the Project have been carried out subsequent to the environmental clearance, they are not, due to what are euphemistically called “slippages”, complete. Those who now examine whether environmental clearance to the Project should be given must be free to commission or carry out such surveys and studies and the like as they deem necessary. They must also, of course, consider such surveys and studies as have already been carried out. Given that the construction of the dam and other work on the Project has already commenced, this factor must play a part in their deciding whether or not environmental clearance should be accorded. Until environmental clearance to the Project is accorded by them, further construction work on the dam shall cease. (Para 271).

A20. In the premises, 1) The Environmental Impact Agency of the Ministry of Environmental and Forests of the Union of India shall forthwith appoint a Committee of Experts in the fields mentioned in Schedule III of the notification dated 27th January, 1994, called the Environmental Impact Assessment Notification, 1994. 2) The Committee of Experts shall gather all necessary data on the environmental impact of the Project. They shall be free to commission or carry out such surveys and studies and the like as they deem necessary. They shall also consider such surveys and studies as have already been

carried out. 3) Upon such data, the Committee of Experts shall assess the environmental impact of the Project and decide if environmental safeguard measures must be adopted, and their cost. 4) In so doing, the Committee of Experts shall take into consideration the fact that the construction of the dam and other work on the Project has already commenced. 5) Until environmental clearance to the Project is accorded by the Committee of Experts as aforesaid, further construction work on the dam shall cease. 6) The Grievance Redressal Authorities of the States of Gujarat, Madhya Pradesh and Maharashtra shall ensure that those ousted by reason of the Project are given relief and rehabilitation in due measure. 7) When the Project obtains environmental clearance, assuming that it does, each of the Grievance Redressal Authorities of the state of Gujarat, Madhya Pradesh and Maharashtra shall, after inspection, certify, before work on the further construction of the dam can begin, that all those ousted by reason of the increase in the height of the dam by 5 meters from its present level have already been satisfactorily rehabilitated and also that suitable vacant land for rehabilitating all those who will be ousted by the increase in the height of the dam by another 5 meters is already in the possession of the respective States. 8) This process shall be repeated for every successive proposed 5 meter increase in the dam height. 9) If for any reason the work on the Project, now or at any time in the future, cannot proceed and the Project is not completed, all oustees who have been rehabilitated shall have the option to continue to reside where they have been rehabilitated or to return to where they were ousted from, provided such place remains habitable, and they should not be made at all liable in monetary or other terms on this account. (Para 280).

Referred: A.P. Pollution Control Board vs. Professor M.V. Mayadu { (1999) 2 SCC 718 = 1999(1) SCALE 140}; Vellore Citizens' Welfare Forum vs. Union of India {(1996) 5 SCC 647 = 1996(6) SCALE 194}; B.D. Sharma vs. Union of India and Others (1992 Suppl. (3) SCC 93}.

Distinguished: Tennessee Valley Authority vs. Hiram G. Hill {437 US 153, 57 L Ed 2d 117, 98 scT 2279}; Arlington Coalition on Transportation vs. John A. Volpe {458 F.2d 1323 (1972)}; Environmental Defense Fund, Inc. vs. Corps of Engineers of United States Army {325 F. Supp. 749 (1971)}.

**PUBLIC INTEREST LITIGATION - NARMADA DAM - INTER-STATE WATER DISPUTES ACT, 1956 - SECTION 5(2) - Relief and Rehabilitation of Project Affected Families (PAFs) - Award of the Narmada Tribunal prescribed certain measure for rehabilitation of oustees - Whether the relief and rehabilitation measures for PAFs are adequate and in accordance with the Award of Narmada Tribunal - Held, per Kirpal, J. (for himself and CJI).**

B1. The displacement of the people due to major river

valley projects has incurred in both developed and developing countries. In the past, there was no definite policy for rehabilitation of displaced persons associated with the river valley projects in India. There were certain project specific programmes for implementation on temporary basis. For the land acquired, compensation under the provisions of Land Acquisition Act, 1894 used to be given to the project affected families. This payment in cash did not result in satisfactory resettlement of the displaced families. Realising the difficulties of displaced persons, the requirement of relief and rehabilitation of PAFs in the case of Sardar Sarovar Project was considered by the Narmada water Disputes Tribunal and the decision and final order of the Tribunal given in 1979 contains detailed directions in regard to acquisition of land and properties, provision for land, house plots and civic amenities for the re-settlement and rehabilitation of the affected families. The re-settlement policy has thus emerged and developed along with Sardar Sarovar Project. (Para 148).

B2. The Award provides that every displaced family, whose more than 25% of agricultural land holding is acquired, shall be entitled to and be allotted irrigatable land of its choice to the extent of land acquired subject to the prescribed ceiling of the State concerned with a minimum of two hectares land. Apart from this land based rehabilitation policy, the Award further provides that each project affected persons will be allotted a house plot free of cost and re-settlement and rehabilitation grant. The civic amenities required by the Award to be provided at places of re-settlement include one primary school for every 100 families, one Panchayat Ghar, one dispensary, one seed Store, one children's park one village pond and one religious place of worship for every 500 families, one drinking water well with trough and one tree platform for every 50 families; approach road linking each colony to main road; electrification; water supply, sanitary arrangement etc. The State Governments have liberalised the policies with regard to re-settlement and have offered packages more than what was provided for in the Award e.g. the Governments of Madhya Pradesh, Maharashtra and Gujarat have extended the R&R benefits through their liberalised policies even to the encroachers, landless/displaced persons, joint holders, Tapu land (island) holders and major sons (18 years old) of all categories of affected persons. The Government of Maharashtra has decided to allot one hectare of agricultural land free of cost even to unmarried major daughters of all categories of PAFs. (Para 14).

B3. The petitioners had contended that no proper surveys were carried out to determine the different categories of affected persons as the total number of affected persons had been shown at a much lower side and that many had been denied PAF status. From what is being stated hereinabove, it is clear that each State has drawn detailed action plan and it is after requisite study had been made that the number of PAFs have been identified. The number has substantially increased from what was

estimated in the Tribunal's Award. The reason for the same, as already noticed, is the liberalisation of the R&R packages by the State Governments. Except for a bald assertion, there appears to be material on which this Court can come to the conclusion that no proper surveys had been carried out for determining the number of PAFs who would be adversely affected by the construction of the dam. (Para 161).

B4. Re-settlement and rehabilitation packages in the three states were different due to different geographical, local and economic conditions and availability of land in the States. The liberal packages available to the Sardar Sarovar Project oustees in Gujarat are not even available to the project affected people of other projects in Gujarat. It is incorrect to say that the difference in R&R packages, the package of Gujarat being the most liberal, amounts to restricting the choice of the oustees. Each State has its own package and the oustees have an option to select the one which was most attractive to them. A project affected family may, for instance, chose to leave its home State of Madhya Pradesh in order to avail the benefits of more generous package of the State of Gujarat while other PAFs similarly situated may opt to remain at home and take advantage of the less liberal package of the State of Madhya Pradesh. There is no requirement that the liberalisation of the packages by three States should be to the same extent and at the same time, the States cannot be faulted if the package which is offered, though not identical with each other, is more liberal than the one envisaged in the Tribunal's Award. (Para 162).

B5. Subsequent to the Tribunal's Award, on the recommendation of the World Bank, the Government of Gujarat adopted to the principle of re-settlement that the oustees shall be relocated as village sections or families in accordance with the oustees preference. The oustees' choice has actively guided the re-settlement process. The requirement in the Tribunal's Award was that the Gujarat shall establish rehabilitation villages in Gujarat in the irrigation command of the Sardar Sarovar project on the norms mentioned for rehabilitation of the families who were willing to migrate to Gujarat. This provision could not be interpreted to mean that the oustees families should be resettled as a homogeneous group in a village exclusively set up for each such group. The concept of community wise re-settlement, therefore, cannot derive support from the above quoted stipulation. Besides, the norms referred to in the stipulation relate to provisions for civic amenities. They vary as regards each civic amenity vis-a-vis the number of oustees families. Thus, one panchayat ghar, one dispensary, one childrens' park, one seed store and one village pond is the norm for 500 families, one primary school (3 rooms) for 100 families and a drinking water well with trough and one platform for every 50 families. The number of families to which the civic amenities were to be provided was thus not uniform and it was not possible to derive therefrom a standardised pattern for the establishment of a site which

had nexus with the number of oustees' families of a particular community or group to be resettled. These were not indicators envisaging re-settlement of the oustees families on the basis of tribes, sub-tribes, groups or sub-groups. (Para 167).

B6. While re-settlement as a group in accordance with the oustees preference was an important principle/objective, the other objectives were that the oustees should have improved or regained the standard of living that they were enjoying prior to their displacement and they should have been fully integrated in the community in which they were re-settled. These objectives were easily achievable if they were re-settled in the command area where the land was twice as productive as the affected land and where large chunks of land were readily available. This was what the Tribunal's Award stipulated and one objective could not be seen in isolation of the other objectives. (Para 168).

B7. The underlined principle in forming the R&R policy was not merely of providing land for PAFs but there was a conscious effort to improve the living conditions of the PAFs and to bring them into the mainstream. If one compares the living conditions of the PAFs in the submerging villages with the rehabilitation packages first provided by the Tribunal's Award and then liberalised by the States, it is obvious that the PAFs had gained substantially after their re-settlement. It is for this reason that in the Action Plan of 1993 of the Government of Madhya Pradesh it was stated before this Court that "therefore, the re-settlement and rehabilitation of people whose habitat and environment makes living difficult does not pose any problems and so the rehabilitation and re-settlement does not pose a threat to environment". In the affidavit of Dr. Asha Singh, Additional Director (Socio&CP), NVDA, as produced by the Government of Madhya Pradesh in respect of visit to R&R sites in Gujarat during 21st to 23rd February, 2000 for ascertaining the status relating to grievances and problems of Madhya Pradesh PAFs resettled in Gujarat, it was, inter alia, mentioned that "the PAFs had informed that the land allotted to them is of good quality and they take the crops of cotton, Jowar and Tuwar. They also stated that their status has improved from the time they had come to Gujarat but they want that water should start flowing in the canals as soon as possible and in that case they will be able to take three crops in one year as their land is in the command area." Whereas the conditions in the hamlets, where the tribals lived, were not good enough the rehabilitation package ensured more basic facilities and civic amenities to the re-settled oustees. Their children would have schools and children's park, primary health centre would take care of their health and, of course, they would have electricity which was not a common feature in the tribal villages. (Para 170).

B8. With regard to providing irrigation facilities, most of the re-settlement of the project affected families were provided irrigation facilities in the Sardar Project command area or in the command areas of other irrigation projects.

In many of the out of command sites, irrigated lands were purchased. In cases where the irrigation facilities were not functioning, the Government of Gujarat had undertaken the work of digging tubewells in order to avoid any difficulty with regard to irrigation in respect of those oustees who did not have adequate irrigation facilities. It was contended that because of the delay in the construction of the project, the cut off date of 1st January, 1987 for extending R&R facilities to major sons were not provided. The tribunal's Award had provided for land for major sons as on 16.8.1978. The Government of Gujarat, however, extended his benefit and offered rehabilitation package by fixing the cut off date of 1.1.1987 for granting benefits to major sons. According to the Tribunal's Award, the sons who had become major one year prior to the issuance of the Notification for land acquisition were entitled to be allotted land. The Land Acquisition Notification had been issued in 1981-82 and as per the Award, it was only those sons who had become major one year prior to that date who would have become eligible for allotment of land. But in order to benefit those major sons who had attained majority later, the Government of Gujarat made a relaxation so as to cover all those who became major upto 1.1.1987. The Government of Gujarat was under no obligation to do this and would have been quite within its right merely to comply with the provisions of the Tribunal's Award. This being so, relaxation of cut off date so as to give extra benefit to those sons who attained age of majority at a later date, cannot be faulted or criticized. (Para 172).

B9. Dealing with the contention of the petitioner that there is a need for a review of the project and that an independent agency should monitor the R&R of the oustees and that no construction should be permitted to be undertaken without the clearance of such an authority, the respondents are right in submitting that there is no warrant for such a contention. The Tribunal's Award is final and binding on the States. The machinery of Narmada Control Authority has been envisaged and constituted under the Award itself. It is not possible to accept that Narmada Control Authority is not to be regarded as an independent authority. Of course some of the members are Government officials but apart from the Union of India, the other States are also represented in this Authority. The project is being undertaken by the Government and it is for the Governmental authorities to execute the same. With the establishment of the R&R Sub-group and constitution of the Grievances Redressal Authorities by the States of Gujarat, Maharashtra and Madhya Pradesh, there is a system in force which will ensure satisfactory re-settlement and rehabilitation of the oustees. There is no basis for contending that some outside agency or National Human Rights Commission should see to the compliance of the Tribunal Award (Para 173).

B10. It is thus seen that there is in place an elaborate network of authorities which have to see the execution and implementation of the project in terms of the Award. All aspects of the project are supervised and there is a Review

Committee which can review any decision of the Narmada Control Authority and each of the three rehabilitating States have set up an independent Grievances Redressal Authority to take care that the relief and rehabilitation measures are properly implemented and the grievances, if any, of the oustees are redressed. (Para 191).

B11. It is more than clear that the GRA, of which Mr. Justice P.D. Desai, is the Chairman, has seen to the establishment of different cells and have taken innovative steps with a view to making R&R effective and meaningful. The steps which are being taken and the assistance given is much more than what is required under the Tribunal's Award. There now seems to be a commitment on the part of the Government of Gujarat to see that there is no laxity in the R&R of the PAPs. It appears that the State of Gujarat has realised that without effective R&R facilities no further construction of the dam would be permitted by the NCA and under the guidance and directions of the GRA meaningful steps are being undertaken in this behalf. (Para 210).

B12. This Court is satisfied that more than adequate steps are being taken by the State of Gujarat not only to implement the Award of the Tribunal to the extent it grants relief to the oustees but the effort is to substantially improve thereon and, therefore, continued monitoring by this Court may not be necessary. (Para 212).

B13. Affidavit on behalf of the State of Madhya Pradesh draws a picture of rehabilitation which is quite different from that of Gujarat. There seems to be no hurry in taking steps to effectively rehabilitate the Madhya Pradesh PAFs in their home State. It is indeed surprising that even awards in respect of six villages out of 33 villages likely to be affected at 90 mtr dam height have not been passed. The impression which one gets after reading the affidavit on behalf of the State of Madhya Pradesh clearly is that the main effort of the said State is to try and convince the PAFs that they should go to Gujarat whose rehabilitation package and effort is far superior to that of the State of Madhya Pradesh. It is, therefore, not surprising that vast majority of the PAFs of Madhya Pradesh have opted to be re-settled in Gujarat but that does not by itself absolve the State of Madhya Pradesh of its responsibility to take prompt steps so as to comply at least with the provisions of the Tribunal's Award relating to relief and rehabilitation. The State of Madhya Pradesh has been contending that the height of the dam should be lowered to 436 ft. so that lesser number of people are dislocated but we find that even with regard to the rehabilitation of the oustees at 436 ft. the R&R programme of the State is nowhere implemented. The State is under an obligation to effectively resettle those oustees whose choice is not to go to Gujarat. Appropriate directions may, therefore, have to be given to ensure that the speed in implementing the R&R picks up. Even the interim report of Mr. Justice Soni, the GRA for the State of Madhya Pradesh, indicates lack of commitment on the States part in looking to the welfare of its own people who

are going to be under the threat of ouster and who have to be rehabilitated. Perhaps the lack of urgency could be because of lack of resources, but then the rehabilitation even in the Madhya Pradesh is to be at the expense of Gujarat. A more likely reason could be that, apart from electricity, the main benefit of the construction of the dam is to be of Gujarat and to a lesser extent to Maharashtra and Rajasthan. In a federal set up like India whenever any such Inter-State project is approved and work undertaken the States involved have a responsibility to cooperate with each other. There is a method of settling the differences which may arise amongst them like, for example, in the case of Inter-State water dispute the reference of the same to a Tribunal. The Award of the Tribunal being binding the States concerned are duty bound to comply with the terms thereof. (Para 217).

B.14. Displacement of people living on the proposed project sites and the areas to be submerged is an important issue. Most of the hydrology projects are located in remote and in0-accessible areas, where local population is, like in the present case, either illiterate or having marginal means of employment and the per capita income of the families is low. It is a fact that people are displaced by projects from their ancestral homes. Displacement of these people would undoubtedly disconnect them from their past, culture, custom and traditions, but then it becomes necessary to harvest a river for larger good. A natural river is not only meant for the people close by but it should be for the benefit of those who can make use of it, being away from it or near by. Realising the fact that displacement of these people would disconnect them from their past, culture, custom and traditions, the moment any village is earmarked for take over dam or any other developmental activity, the project implementing authorities have to implement R&R programmes whatsoever relating to all, whether rich or poor, land owner or encroacher, farmer or tenant, employee or employer, tribal or non-tribal. A properly drafted R&R plan would improve living standards of displaced persons after displacement. For example residents of villages around Bhakra Nangal Dam, Nagarjun Sagar Dam, Tehri, Bhillai Steel Plant, Bokaro and Bala Iron and Steel Plant and numerous other developmental sites are better off than people living in villages in whose vicinity no development project came in. It is not fair that tribals and the people in un-developed villages should continue in the same condition without ever enjoying the fruits of science and technology for better health and have a higher quality of life style. Should they not be encouraged to seek greener pastures elsewhere, if they can have access to it, either through their own efforts due to information exchange or due to outside compulsions. It is with this object in view that the R&R plans which are developed are meant to ensure that those who move must be better off in the new locations at Government cost. In the present case, the R&R packages of the States, especially of Gujarat, are such that the living conditions of the oustees will be much better than what they had in their tribal hamlets. (Para 237).

B15. Two conditions have to be kept in mind, (i) the completion of project at the earliest and (ii) ensuring compliance with conditions on which clearance of the project was given including completion of relief and rehabilitation work and taking of ameliorative and compensatory measures for environmental protection in compliance with the scheme framed by the Government thereby protecting the rights under article 21 of the Constitution. Keeping these principles in view, we issue the following directions. 1) Construction of the dam will continue as per the Award of the Tribunal. 2) As the Relief and Rehabilitation Sub-group has cleared the construction up to 90 metres, the same can be undertaken immediately. Further raising of the height will be only *pari passu* with the implementation of the relief and rehabilitation and on the clearance by the Relief and Rehabilitation Sub-group. The Relief and Rehabilitation Sub-Group will give clearance of further construction after consulting the three Grievances Redressal Authorities. 3) The Environment Sub-group under the Secretary, Ministry of Environment & Forests, Government of India will consider and give, at each stage of the construction of the dam, environment clearance before further construction beyond 90 meters can be undertaken. 4) The permission to raise the dam height beyond 90 meters will be given by the Narmada Control Authority, from time to time, after it obtains the above-mentioned clearances from the Relief and Rehabilitation Sub-group and the Environment Sub-group. 5) The reports of the Grievances Redressal Authorities, and of Madhya Pradesh in particular, shows that there is a considerable slackness in the work of identification of land, acquisition of suitable land and the consequent steps necessary to be taken to rehabilitate the project oustees. We direct the States of Madhya Pradesh, Maharashtra and Gujarat to implement the Award and give relief and rehabilitation to the oustees in terms of the packages offered by them and these States shall comply with any direction in this regard which is given either by the NCA or the Review Committee or the Grievances Redressal Authorities. 6). Even though there has been substantial compliance with the conditions imposed under the environment clearance the NCA and the Environment Sub-group will continue to monitor and ensure that all steps are taken not only to protect but to restore and improve the environment. 7) The NCA will within four weeks from today draw up an Action Plan in relation to further construction and the relief and rehabilitation work to be undertaken. Such an Action Plan will fix a time frame so as to ensure relief and rehabilitation *pari passu* with the increase in the height of the dam. Each state shall abide by the terms of the action plan so prepared by the NCA and in the event of any dispute or difficulty arising, representation may be made to the Review Committee. However, each State shall be bound to comply with the directions of the NCA with regard to the acquisition of land for the purpose of relief and rehabilitation to the extent and within the period specified by the NCA. 8) The Review Committee shall meet whenever required to do so in the event of there being any un-resolved dispute on an issue which is before

the NCA. In any event the Review Committee shall meet at least once in three months so as to oversee the progress of construction of the dam and implementation of the R&R programmes. If for any reason serious differences in implementation of the Award arise and the same cannot be resolved in the Review Committee, the Committee may refer the same to the Prime Minister whose decision, in respect thereof, shall be final and binding on all concerned. 9) The Grievances Redressal Authorities will be at liberty, in case the need arises, to issue appropriate directions to the respective States for due implementation of the R&R programmes and in case of non-implementation of its directions, the GRAs will be at liberty to approach the Review Committee for appropriate orders. 10) Every endeavour shall be made to see that the project is completed as expeditiously as possible. (Para 250).

**per Bharucha, J. (dissenting)**

B16. The many interim orders that this Court made in the years in which this writ petition was pending show how very little had been done in regard to the relief and rehabilitation of those ousted. It is by reason of the interim orders, and, in fairness, the co-operation and assistance of learned counsel who appeared for the States, that much that was wrong has now been redressed. The States have also been persuaded to set up Grievance Redressal Authorities and it will be the responsibility of these Authorities to ensure that those ousted by reason of the Project are given relief and rehabilitation in due measure. (Para 274).

B17. The States are lagging behind in the matter of the identification and acquisition of land upon which the oustees are to be resettled. Having regard to the experience of the past, only the Grievance Redressal Authorities can be trusted by this Court to ensure that the States are in possession of vacant lands suitable for the rehabilitation of the oustees. During the time that it takes to assess the environmental impact of the Project, the States must take steps to obtain, by acquisition or otherwise, vacant possession of suitable lands upon which the oustees can be rehabilitated. When the Project obtains environmental clearance, assuming that it does, each of the Grievance Redressal Authorities of the States of Gujarat, Madhya Pradesh and Maharashtra must certify, after inspection, before work on the further construction of the dam can begin, that all those ousted by reason of the satisfactorily rehabilitated and also that suitable vacant land for rehabilitating all those who will be ousted by the increase in the height of the dam by another 5 meters is already in the possession of the respective States; and this process must be repeated for every successive proposed 5 meter increase in the dam height (Para 275).

B18. Only by ensuring that relief and rehabilitation is so supervised by the Grievance Redressal Authorities can this Court be assured that the oustees will get their due. (Para 276).

B19. It is necessary to provide for the contingency that, for one or other reason, the work on the Project, now or at any time in future, does not proceed and the Project is not completed. Should that happen, all oustees who have been rehabilitated must have the option to continue to reside where they have been rehabilitated or to return to where they were ousted from, provided such place remain habitable, and they must not be made at all liable in monetary or other terms on this account. (Para 277).

**PUBLIC INTEREST LITIGATION –  
INFRASTRUCTURAL PROJECT - NARMADA  
DAM - Scope of Court's interference in such  
projects - Held, per Kirpal, J. (for himself and  
CJI).**

C1. There are three stages with regard to the undertaking of an infrastructural project. One is conception or planning, second is decision to undertake the project and the third is the execution of the project. The conception and the decision to undertake a project is to be regarded as a policy decision. While there is always a need for such projects not being unduly delayed, it is at the same time expected that as thorough a study as is possible will be undertaken before a decision is taken to start a project. Once such a considered decision is taken, the proper execution of the same should be taken expeditiously. It is for the Government to decide how to do its job. When it has put a system in place for the execution of a project and such a system cannot be said to be arbitrary, then the only role which a Court may have to play is to see that the system works in the manner it was envisaged. (Para 223).

C2. A project may be executed departmentally or by an outside agency. The Court should not assume that these authorities will not function properly. In our opinion the Court should have no role to play. (Para 224).

C3. It is now well-settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the Courts are ill equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution. Even then any challenge to such a policy decision must be before the execution of the project is undertaken. Any delay in the execution of the project means over run in costs and the decision to undertake a project, if challenged after its execution has commenced, should be thrown out at the very threshold on the ground of laches if the petitioner had the knowledge of such a decision and could have approached the Court at the time. Just because a petition is termed as a PIL does not mean that ordinary principles applicable to litigation will not apply. Laches is one of them. (Para 225).



C4. Public Interest Litigation (PIL) was an innovation essentially to safeguard and protect the human rights of those people who were unable to protect themselves. With the passage of time the PIL jurisdiction has been ballooning so as to encompass within its ambit subjects such as probity in public life, granting of largess in the form of licences, protecting environment and the like. But the balloon should not be inflated so much that it bursts. Public Interest Litigation should not be allowed to degenerate to becoming Publicity Interest Litigation or Private Inquisitiveness Litigation. (Para 26).

C5. While exercising jurisdiction in PIL cases Court has not forsaken its duty and role as a Court of law dispensing justice in accordance with law. It is only where there has been a failure on the part of any authority in acting according to law or in non-action or acting in violation of the law that the Court has stepped in. No directions are issued which are in conflict with any legal provisions. Directions have, in appropriate cases, been given where the law is silent and inaction would result in violation of the Fundamental Rights or other Legal Provisions. (Para 227).

C6. While protecting the rights of the people from being violated in any manner utmost care has to be taken that the Court does not transgress its jurisdiction. There is in our Constitutional frame-work a fairly clear demarcation of powers. The court has come down heavily whenever the executive has sought to impinge upon the Court's jurisdiction. (Para 228).

C7. At the same time, in exercise of its enormous power the Court should not be called upon or undertake governmental duties or functions. The Courts cannot run the Government nor the administration indulge in abuse or non-use of power and get away with it. The essence of judicial in abuse or non-use of power and get away with it. The essence of judicial review is a constitutional fundamental. The role of the higher judiciary under the constitution and rights of Indians. The courts must, therefore, act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reason that it has been consistently held by this Court that in matters of policy the Court will not interfere. When there is a valid law requiring the Government to act in a particular manner the Court ought not to, without striking down the law, give any direction which is not in accordance with law. In other words the Court itself is not above the law. (Para 229).

C8. In respect of public projects and policies which are initiated by the Government the Courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is

not mala fide, it will not be in Public Interest to require the Court to go into and investigate those areas which are the function of the executive. (Para 230).

C9. For any project which is approved after due deliberation the Court should refrain from being asked to review the decision just because a petitioner in filing a PIL alleges that such a decision should not have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government, is possible. When two or more options or views are possible and after considering them the Government takes a policy decision it is then not the function of the Court to go into the matte afresh and, in a way, sit in appeal over such a policy decision. (Para 230).

C10. What the petitioner wants the Court to do in this case is precisely that. The facts enumerated hereinabove clearly indicate that the Central Government had taken a decision to construct the Dam as that was the only solution available to it for providing water to water scare areas. It was known at that time that people will be displaced and will have to be rehabilitated. There is not material to enable this Court to come to the conclusion that the decision was mala fide. A hard decision need not necessarily be a bad decision. (Para231).

C11. Confecting rights had to be considered. If for one set of people namely those of Gujarat, there was only one solution, namely, construction of a dam, the same would have an adverse effect on another set of people whose houses and agricultural land would be submerged in water. It is because of this conflicting interest that considerable time was taken before the project was finally cleared in 1987. Perhaps the need for giving the green signal was that while for the people of Gujarat, there was no other solution but to provide them with water from Narmada, the hardships of oustees from Madhya Pradesh could be mitigated by providing them with alternative lands, sites and compensation. In governance of the State, such decisions have to be taken where there are conflicting interests. When a decision is taken by the Government after due consideration and full application of mind, the Court is not to sit in appeal over such decision. (Para 234).

C12. In the case of projects of national importance where Union of India and/or more than one State(s) are involved and the project would benefit a large section of the society and there is evidence to show that the said project had been contemplated and considered over a period of time at the highest level of the State and the Union of India and more so when the project is evaluated and approval granted by the Planning Commision, then there should be no occasion for any Court carrying out any review of the same or directing its review by any outside or "independent" agency or body. In a democratic set up, it is for the elected Government to decide what project should be undertaken for the benefit of the people. Once such a decision had been taken that unless and until it can be proved or shown

that there is a blatant illegality in the undertaking of the project or in its execution, the Court ought not to interfere with the execution of the project. (Para 236).

**PUBLIC INTEREST LITIGATION - CONSTITUTION - ARTICLE 21 - NARMADA DAM - Displacement of tribals and other persons as a consequence of the Narmada Dam Project - Whether the forcible displacement of tribals and other marginal farmers from their lands and sources of livelihood was violative of their fundamental rights under Article 21 of the Constitution - Held,**

per Kirpal, J. (for himself and CJI).

D1. The allegation that the said project was not in the national or public interest is not correct seeing to the need of water for burgeoning population which is most critical and important. The population of India, which is now one billion, is expected to reach a figure between 1.5 billion and 1.8 billion in the year 2050, would necessitate the need of 2788 billion cubic meter of water annually in India to be above water stress zone and 1650 billion cubic meter to avoid being water scarce country. The main source of water in India is rainfall which occurs in about 4 months in a year and the temporal distribution of rainfall is so uneven that the annual averages have very little significance for all practical purposes. According to the Union of India, one third of the country is always under threat of drought not necessarily due to deficient rainfall about many times due to its uneven occurrence. To feed the increasing population, more food grain is required and effort has to be made to provide safe drinking water, which, at present, is a distant reality for most of the population specially in the rural areas. Keeping in view the need to augment water supply, it is necessary that water storage capacities have to be increased adequately in order to ward off the difficulties in the event of monsoon failure as well as to meet the demand during dry season. It is estimated that by the year 2050 the country needs to create storage of at least 600 billion cubic meter against the existing storage of 174 billion cubic meter. (Para 58).

D2. There is merit in the contention of the respondents that there would be a positive impact on preservation of ecology as a result from the project. The SSP would be making positive contribution for preservation of environment in several ways. The project by taking water to drought-prone and arid parts of Gujarat and Rajasthan would effectively arrest ecological degradation which was returning to make these areas inhabitable due to salinity ingress, advancement of desert, ground water depletion, fluoride and nitrite affected water and vanishing green cover. The ecology of water scarcity areas is under stress and transfer of Narmada water to these areas will lead to sustainable agriculture and spread of green cover. There will also be improvement of fodder availability which will reduce pressure on biodiversity and vegetation. The SSP by generating clean eco-friendly hydropower will save the

air pollution which would otherwise take place by thermal generation power of similar capacity. (Para 60).

D3. The displacement of the tribals and other persons would not per se result in the violation of their fundamental or other rights. The effect is to see that on their rehabilitation at new locations they are better off than what they were. At the rehabilitation sites they will have more and better amenities than which they enjoyed in their tribal hamlets. The gradual assimilation in the main stream of the society will lead to betterment and progress. (Para 61).

**Referred: Gramophone Co. of India Ltd. vs. B.B. Pandey (1984 (2) SCC 534 = 1984 (1) SCALE 338); PUCL vs Union of India [1997(3) SCC 433 = 1997(1) SCALE 706]; CERC vs Union of India [1995(3) SCC 42 = 1995(1) SCALE 354].**

**PUBLIC INTEREST LITIGATION - LACHES - CONSTITUTION - ARTICLE 32 - Public Interest Litigation filed challenging the construction of Narmada Dam - project was given environmental clearance in 1987 - Writ petition filed in 1994 - Whether the petition is liable to be dismissed on the ground of laches - Held,**

per Kirpal, J. (for himself and CJI).

E1. The project, in principle, was cleared more than 25 years ago when the foundation stone was laid by the late Pandit Jawahar Lal Nehru. Thereafter, there was an agreement of the four Chief Ministers in 1974, namely, the Chief Ministers of Madhya Pradesh, Gujarat, Maharashtra and Rajasthan for the project to be undertaken. Then dispute arose with regard to the height of the dam which was settled with the award of the Tribunal being given in 1978. For a number of years, thereafter, final clearance was still not given. In the meantime some environmental studies were conducted. The final clearance was not given because of the environmental concern which is quite evident. Even though complete data with regard to the environment was not available, the Government did in 1987 finally give environmental clearance. It is thereafter that the construction of the dam was undertaken and hundreds of crores have been invested before the petitioner chose to file a writ petition in 1994 challenging the decision to construct the dam and the clearance as was given. In our opinion, the petitioner which had been agitating against the dam since 1986 is guilty of laches in not approaching the Court at an earlier point of time. (Para 46).

E2. When such projects are undertaken and hundreds of crores of public money is spent, individual or organisations in the garb of PIL cannot be permitted to challenge the policy decision taken after a lapse of time. It is against the national interest and contrary to the established principles of law that decisions to undertake developmental projects are permitted to be challenged after a number of years during which period public money has been spent in the execution of the project. (Para 47).

E3. The petitioner has been agitating against the construction of the dam since 1986, before environmental clearance was given and construction started. It has, over the years, chosen different paths to oppose the dam. At its instance a Five Member Group was constituted, but its report could not result in the stoppage of construction *pari passu* with relief and rehabilitation measures. Having failed in its attempt to stall the project the petitioner has resorted to court proceedings by filing this writ petition long after the environmental clearance was given and construction started. The pleas relating to height of the dam and the extend of submergence, environment studies and clearance, hydrology, seismicity and other issues, except implementation of relief and rehabilitation, cannot be permitted to be raised at this belated stage. (Para 48).

E4. This Court has entertained this petition with a view to satisfy itself that there is proper implementation of the relief and rehabilitation measures at least to the extent they have been ordered by the Tribunal's Award. In short it was only the concern of this Court for the protection of the fundamental rights of the oustees under Article 21 of the Constitution of India which led to the entertaining of this petition. It is the Relief and Rehabilitation measures that this Court is really concerned with and the petition in regard to the other issues raised is highly belated. (Para 49).

**per Bharucha, J. (dissenting)**

E5. When the writ petition was filed the process of relief and rehabilitation, such as it was, going on. The writ petitioners were not guilty of any laches in that regard. In the writ petition they raised other issues, one among them being related to the environmental clearance of the Project. Given what has been held in respect of the of the environmental clearance, when the public interest is so demonstrably involved, it would be against public interest to decline relief only on the ground that the Court was approached belatedly. (Para 278).

**Referred: The State of Karnataka vs State of Andhra Pradesh and Others (2000(3) SCALE 505)**

**INTER-STATE RIVER WATER DISPUTES - INTER-STATE WATER DISPUTES ACT, 1956 - SECTION 5(2) - Award passed by Tribunal constituted under Section 4 of the Act - Binding nature of - Whether the height of the Dam can be reduced contrary to the Award with a view to decreasing the number of oustees - Held,**

**per Kirpal, J. (for himself and CJI).**

F1. Briefly stated the Tribunal had in no uncertain terms come to the conclusion that the height of the dam should be 455 ft. It had rejected the contention of the State of Madhya Pradesh for fixing the height at a lower level. At the same time in arriving at this figure, it had considered the relief and rehabilitation problems and had issued directions in respect thereof. Any issue which has been

decided by the Tribunal would, in law, be binding on the respective states. Once the Award is binding on the States, it will not be open to a third party like the petitioners to challenge the correctness thereof. In terms of the Award, the State of Gujarat has a right to construct a dam upto the height of 455 ft. and, at the same time, the oustees have a right to demand relief and re-settlement as directed in the Award. (Para 51).

F2. The Award of the Tribunal is binding on the States concerned. The said Award also envisages the relief and rehabilitation measures which are to be undertaken. If for any reason, any of the State Governments involved lag behind in providing adequate relief and rehabilitation then the proper course, for a Court to take, would be to direct the Award's implementation and not to stop the execution of the project. This Court as a Federal Court of the country especially in a case of inter-State river dispute where an Award had been made, has to ensure that the binding Award is implemented. In this regard, the Court would have the jurisdiction to issue necessary directions to the State which, though bound, chooses not to carry out its obligations under the Award. Just as an ordinary litigant is bound by the decree, similarly a State is bound by the Award. Just as the execution of a decree can be ordered, similarly, the implementation of the Award can be directed. If there is a short fall in carrying out the R&R measures, a time bound direction can and should be given in order to ensure the implementation of the Award. Putting the project on hold is no solution. It only encourages recalcitrant State to flout and not implement the award with impunity. This certainly cannot be permitted. Nor is it desirable in the national interest that where fundamental right to life of the people who continue to suffer due to shortage of water to such an extent that even the drinking water becomes scarce, non-cooperation of a State results in the stagnation of the project. (Para 241).

**PUBLIC INTEREST LITIGATION - ENVIRONMENT - PRECAUTIONARY PRINCIPLE - Scope of - Held,**

**per Kirpal, J. (for himself and CJI)**

G1. It appears to us that the 'precautionary principle' and the corresponding burden of proof on the person who wants to change the status quo will ordinarily apply in a case of polluting or other project or industry where the extent of damage or pollution likely to be caused then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution. On the other hand where the effect on ecology or environmental of setting up of an industry is known what has to be seen is that if the environment is likely to suffer, then what mitigative steps can be taken to offset the same. Merely because there will be a change is no reason to presume that there will be ecological disaster. It is when the effect of the project is known then the principle of sustainable development would come into play which

will ensure that mitigative steps are and can be taken to preserve the ecological balance. Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation. (Para 120).

**Kirpal, J.** - Narmada is the fifth largest river in India and largest West flowing river of the Indian Peninsula. Its annual flow approximates to the combined flow of the rivers Sutlej, Beas and Ravi. Originating from the Maikala ranges at Amarkantak in Madhya Pradesh, it flows Westwards over a length of about 1312 km. before draining into the Gulf of Cambay, 50 km. West of Bharuch City. The first 1077 km. stretch is in Madhya Pradesh and the next 35 km. stretch of the river forms the boundary between the States of Madhya Pradesh and Maharashtra. Again, the next 39 km. forms the boundary between Maharashtra and Gujarat and the last stretch of 161 km. lies in Gujarat.

The Basin area of this river is about 1 lac sq. km. The utilization of this river basin, however, is hardly about 4%. Most of the water of this peninsula river goes into the sea. In spite of the huge potential, there was hardly any development of the Narmada water resources prior to independence.

In 1946, the then Government of Central Provinces and Berar and the then Government, of Bombay requested the Central Waterways, Irrigation and Navigation Commission (CWINC) to take up investigations on the Narmada river system for basins-wise development of the river with flood control, irrigation, power and extension of navigation as the objectives in view. The study commenced in 1947 and most of the sites were inspected by engineers and geologists who recommended detailed investigation for seven projects. Thereafter in 1948, the Central Ministry of Woks, Mines and Power appointed an Ad-hoc Committee headed by Shri A.N. Khosla, Chairman, CWINC to study the projects and to recommend the priorities. This Ad-hoc Committee recommended as an initial stop detailed investigations for the following projects keeping in view the availability of men, materials and resources:

1. Bargi Project
2. Tawa Project near Hoshangabad
3. Punasa Project and
4. Broach Project

Based on the recommendations of the aforesaid Ad-hoc Committee, estimates for investigations of the Bargi, Tawa, Punasa (Narmadasagar) and Broach Projects were sanctioned by the Government of India in March, 1949.

The Central Water & Power Commission carried out a study of the hydroelectric potential of the Narmada basin in the year 1955. After the investigations were carried out by the Central Water & Power Commission, the Navagam site was finally decided upon in consultation with the erstwhile Government of Bombay for the construction of

the dam. The Central Water & Power Commission forwarded its recommendations to the then Government of Bombay. At that time the implementation was contemplated in two stages. In State-I, the Full Reservoir Level (Hereinafter referred to as 'FRL') was restricted to 160 ft. with provision for wider foundations to enable resigning of the dame to FRL 300 ft. in Stage-II. The erstwhile Bombay Government suggested two modifications, first the FRL of the dam be raised from 300 to 320 ft. in Stage-II and second the provision of a power house in the river bed and a power house at the head of the low level canal be also made. This project was then reviewed by a panel of Consultants appointed by the Ministry of Irrigation & Power who in a report in 1960 suggested that the two stages of the Navagam dam as proposed should be combined to one and the dam be constructed to its final FRL 320 ft. in one stage only. The Consultants also stated that there was scope for extending irrigation from the high level canal towards the ran of Kutch.

With the formation of the State of Gujarat on 1st May, 196, the Narmada Project stood transferred to that State. Accordingly, the Government of Gujarat gave an administrative approval to Stage-I of the Narmada Project in February, 1961. The Project was then inaugurated by late Pandit Jawaharlal Nehru on 5th April, 1961. The preliminary works such as approach roads & bridges, colonies, staff buildings and remaining investigations for dam foundations were soon taken up.

The Gujarat Government undertook surveys for the high level canal in 1961. The submergence area survey of the reservoir enabled assessment of the storage capability of the Navagam reservoir, if its height should be raised beyond FRL 320 ft. The studies indicated that a reservoir with FRL + 460 ft. would enable realisation of optimum benefits from the river by utilising the untapped flow below Punasa dam and would make it possible to extend irrigation to a further area of over 20 lakh acres. Accordingly, explorations for locating a more suitable site in the narrower gorge portion were taken in hand and finally in November, 1963, site No. 3 was round to be most suitable on the basis of the recommendations of the Geological Survey of India and also on the bias of exploration and investigations with regard to the foundation as well as construction materials available in the vicinity of the dam site.

In November, 1963, the Union Minister of Irrigation & Power held a meeting with the Chief Ministers of Gujarat and Madhya Pradesh at Bhopal. As a result of the discussions and exchange of vies, an agreement (Bhopal Agreement) was arrived at. The salient features of the said Agreement were:

- a) That the Navagam Dam should be built to FRL 425 by the Government of Gujarat and its entire benefits were to be enjoyed by the State of Gujarat.
- b) Punasa dam (Madhya Pradesh) should be built to

FRL 850. The costs and power benefits of Punasa Power Project shall be shared in the ratio 1:2 between the Governments of Gujarat and Madhya Pradesh. Out of the power available to Madhya Pradesh half of the quantum was to be given to the State of Maharashtra for a period of 25 years for which the State of Maharashtra was to provide a loan to the extend of one-third the cost of Punasa Dam. The loan to be given by the State of Maharashtra was to be returned within a period of 25 years.

- c) Bargi Project was to be implemented by the State of Madhya Pradesh, Bargi Dam was to be built to FRL 1365 in Stage I and FRL 1390 in Stage II and the Governments of Gujarat and Maharashtra were to give a total loan assistance of Rs 10 crores for the same.

In pursuance of the Bhopal Agreement, the Government of Gujarat prepared a brief project report envisaging the Navagam Dam FRL 425 ft. and submitted the same to the Central Water and Power Commission under Gujarat Government's letter dated 14th February, 1964. Madhya Pradesh, however, did not ratify the Bhopal Agreement. In order to overcome the stalemate following the rejection of the Bhopal Agreement by Madhya Pradesh, a High Level Committee of eminent engineers headed by Dr. A.N. Khosla, the then Governor of Orissa, was constituted on 5th September, 1964 by the Government of India in consultation with the States of Madhya Pradesh, Maharashtra and Gujarat. The same read as under:

- i) Drawing up of a Master Plan for the optimum and integrated development of the Narmada water resources.
- ii) The phasing of its implementation for maximum development of the resources and other benefits.
- iii) The examination, in particular, of Navagam and alternative projects, if any, and determining the optimum reservoir level or levels.
- iv) Making recommendations of any other ancillary matters.

The Khosla Committee submitted the unanimous report to the Government of India in September, 1965 and recommended a Master Plan of the Narmada water development. In Chapter XI of the said Report, the Khosla Committee outlined its approach to the plan of Narmada development. An extract from this Chapter is reproduced below:

“11.1 In their meeting from 14th to 18th December, 1964 at which the State representatives were also present, the Committee laid down the following basic guidelines in drawing up the Master Plan for the optimum and integrated development of the Narmada water resources:-

1. National interest should have overriding priority. The plan should, therefore, provide for maximum benefits in respect of irrigation, power generation, flood control, navigation etc. irrespective of State boundaries;

2. Rights and interests of State concerned should be fully safeguarded subject to (I) above;
3. Requirements of irrigation should have priority over those power;  
Subject to the provision that suitable apportionment of water between irrigation and power may have to be considered, should it be found that with full development of irrigation, power production is unduly affected;
4. Irrigation should be extended to the maximum area within physical limits of command, irrespective of State boundaries, subject to availability of water; and in particular, to the arid areas along the international border with Pakistan both in Gujarat and Rajasthan to encourage sturdy peasants to settle in these border areas (later events have confirmed the imperative need for this); and
5. All available water should be utilised to the maximum extent possible for irrigation and power generation and, when no irrigation is possible, for power generation. The quantity going waste to the sea without doing irrigation or generating power should be kept to the un-avoidable minimum.”

The Master Plan recommended by the Khosla Committee envisaged 12 major projects to be taken up in Madhya Pradesh and on, viz., Navagam in Gujarat. As for as Navagam Dam was concerned, the Committee recommended as follows:-

1. The terminal dam should be located at Navagam.
2. The optimum FRL of the Navagam worked out to RL 500 ft.
3. The FSL (Full Supply Level) of the Navagam canal at off-take should be RL 300 ft.
4. The installed capacity at the river bed power station and canal power station should be 1000 mw and 240 mw respectively with one stand-by unit in each power station ( in other words the total installed capacity at Navagam would be 1400 mw).

The benefits of the Navagam Dam as assessed by the Khosla Committee were as follows:-

“(1) Irrigation of 15.80 lakh hectares (39.4 lakh acres) in Gujarat and 0.4 lakh hectares (1.00 lakh acres) in Rajasthan. In addition, the Narmada waters when fed into the existing Mahi Canal system would release Mahi water to be diverted on higher contours enabling additional irrigation of 1.6 to 2.0 lakh hectares (4 to 5 lakh acres) approximately in Gujarat and 3.04 lakh hectares (7.5 lakh acres) in Rajasthan.

(2) Hydro-power generation of 951 MW at 60% LF in the mean year of development of irrigation in Gujarat, Madhya Pradesh, Maharashtra and Rajasthan.”

The Khosla Committee stressed an important point in favour of high Navagam Dam, namely, additional storage.

They emphasized that this additional storage will remit greater carryout capacity, increased power production and assured optimum irrigation and flood control and would minimise the wastage of water to the sea. The Khosla Committee also observed that instead of higher Navagam Dam as proposed, if Harinphal or Jalsindhi dams were raised to the same FRL as at Navagam, the submergence would continue to remain about the same because the cultivated and inhabited areas lie mostly above Harinphal while in the intervening 113 km (70 mile) gorge between Harinphal and Navagam, there was very little habitation or cultivated areas.

The Khosla Committee report could not be implemented on account of disagreement among the States. On 6th July, 1968 the State of Gujarat made a complaint to the Government of India under Section 3 of the Inter-State Water Disputes Act, 1956 stating that a water dispute had arisen between the State of Gujarat and the Respondent States of Madhya Pradesh and Maharashtra over the use, distribution and control of the waters of the Inter-State River Narmada. The substance of the allegation was that executive action had been taken by Maharashtra and Madhya Pradesh which had prejudicially affected the State of Gujarat and its inhabitants. These State of Gujarat objected to the proposal of the State of Madhya Pradesh to construct Maheshwar and Harinphal Dams over the river Narmada in its lower reach and also to the agreement reached between the State of Madhya Pradesh and Maharashtra to jointly construct the Jalsinghi Dam over Narmada in its course between the two States. The main reason for the objection was that if these projects were implemented, the same would prejudicially affect the rights and interests of Gujarat State by compelling it to restrict the height of the dam at Navagam to FRL 210 ft. or less. Reducing the height of the dam would mean the permanent detriment of irrigation and power benefits that would be available to the inhabitants of Gujarat and this would also make it impossible for Gujarat to re-claim the desert area in the Ranks of Kutch. According to the State of Gujarat, the principal matters in disputes were as under:

- (i) The right of the State of Gujarat to control and use the waters of the Narmada river on well-accepted principles applicable to the use of waters of inter-State rivers;
- (ii) the right of the State of Gujarat to object to the arrangement between the State of Madhya Pradesh and the State of Maharashtra for the development of Jalsindhi dam;
- (iii) the right of the State of Gujarat to raise the Navagam dam to an optimum height commensurate with the efficient use of Narmada waters including its control for providing requisite cushion for flood control; and
- (iv) the consequential right of submergence of area in the State of Madhya Pradesh and Maharashtra and areas in the Gujarat State.

Acting under Section 4 of the Inter State Water Disputes Act, 1956, the Government of India constituted a Tribunal headed by Honourable Mr. Justice V. Ramaswamy, a retired judge of this Court. On the same day, the Government made a reference of the water dispute to the Tribunal. The Reference being in the following terms:

“In exercise of the powers conferred by sub-section (I) of Section 5 of the Inter- State Water Disputes Act, 1956 (33 of 1956), the Central Government hereby refers to the Narmada Water Disputes Tribunal for adjudication of the water dispute regarding the inter-State river, Narmada, and the river-valley thereof, emerging from letter No. mip -5565/C- 10527-K dated the 6th July, 1968, from the Government of Gujarat”.

On 16th October, 1969, the Government of India made another reference of certain issues raised by the State of Rajasthan to the said Tribunal.

The State of Madhya Pradesh filed a Demurrer before the Tribunals stating that the constitution of the Tribunal and reference to it were ultra vires of the Act. The Tribunal framed 24 issues which included the issues relating to the Gujara having a right to construct a high dam with FRL 530 feet and a canal with FSL 300 feet or thereabouts. Issues 1(a), 1(b), 1(A), 2,3 and 19 were tried as preliminary issues of law and by its decision dated 23rd February, 1972, the said issues were decided against the respondents herein. It was held that the Notification of the Central Government dated 16th October, 1969 referring the matters raised by the State of Rajasthan by its complaint was ultra vires of the Act but constitution of the Tribunal and making a reference of the water dispute regarding the Inter-State river Narmada was not ultra vires of the Act and the Tribunal had jurisdiction to decide the dispute referred to it at the instance of State of Gujarat. It further held that the proposed construction of the Navagam project involving consequent submergence of portions of the territories of Maharashtra and Madhya Pradesh could form the subject matter of a “water dispute” within the meaning of Section 2(c) of the 1956 Act. It also held that it had the jurisdiction to give appropriate direction to Madhya Pradesh and maharashtra to take steps by way of acquisition or otherwise for making submerged land available to Gujarat in order to enable it to execute the Navagam Project and the Tribunal had the jurisdiction to give consequent directions to Gujarat and other party States regarding payment of compensation to Maharashtra and Madhya Pradesh, for giving them a share in the beneficial use of Navagam dam, and for rehabilitation of displaced persons.

Against the aforesaid judgement of the Tribunal on the preliminary issues, the States of Madhya Pradesh and Rajasthan filed appeals by special leave to this Court and obtained a stay of the proceedings before the Tribunal to a limited extent. This court directed that the proceedings

before the tribunal should be stayed but discovery, inspection and other miscellaneous proceedings before the Tribunal may go on. The State of Rajasthan was directed to participate in these interlocutory proceedings.

It appears that on 31.7.1972, the Chief Ministers of Madhya Pradesh, Maharashtra, Gujarat and Rajasthan had entered into an agreement to compromise the matters in dispute with the assistance of Prime Minister of India. This led to a formal agreement dated 12th July, 1974 being arrived at between the Chief Ministers of Madhya Pradesh, Maharashtra & Rajasthan and the Advisor to the Governor of Gujarat on a number of issues which the Tribunal otherwise would have had to go into. The main features of the Agreement as far as this case is concerned, were that the quantity of water in Narmada available for 75% of the year was to be assessed at 28 million acre feet and the Tribunal in determining the disputes referred to it was to proceed on the basis of this assessment. The net available quantity of water for use in Madhya Pradesh and Gujarat was to be regarded as 27.25 million acre feet which was to be allocated between the States. The height of the Navagam Dam was to be fixed by the Tribunal after taking into consideration various contentions and submissions of the parties and it was agreed that the appeals filed in this Court by the States of Madhya Pradesh and Rajasthan would be withdrawn. It was also noted in this agreement that “development of Narmada should no longer be delayed in the best regional and national interests”.

After the withdrawal of the appeals by the State of Madhya Pradesh and Rajasthan, the Tribunal proceeded to decide the remaining issues between the parties.

On the 16th August, 1978, the Tribunal declared its Award under Section 5(2) read with Section 5(4) of the Inter-State Water Disputes Act, 1956. Thereafter, reference numbers 1,2,3,4 & 5 of 1978 were filed by the Union of India and the State of Gujarat, Madhya Pradesh, Maharashtra and Rajasthan respectively under section 5(3) of the Inter-State Water Disputes Act, 1956. These references were heard by the Tribunal, which on 7th December, 1979, gave its final order. The same was published in the extraordinary Gazette by the Government of India on 12th December, 1979. In arriving at its final decision, the issues regarding allocation, height of dam, hydrology and other related issues came to be subjected to comprehensive and thorough examination by the Tribunal. Extensive studies were done by the Irrigation Commission and Drought Research Unit of India, Meteorological Department in matters of catchment area of Narmada Basin, major tributaries of Narmada Basin, drainage areas of Narmada Basin, climate, rainfall, variability of rainfall, arid and semi-arid zones and scarcity area of Gujarat. The perusal of the report shown that the Tribunal also took into consideration various technical literature before giving its Award.

## **AWARD OF THE TRIBUNAL**

The main parameters of the decision of the Tribunal were as under:

### **A) Determination of the Height of Sardar Sarovar Dam**

The hewing of the Sardar Sarovar Dam was determined at FRL 455 ft. The Tribunal was of the view that the FRL 436ft. was required for irrigation use alone. In order to generate power throughout the year, it would be necessary to provide all the live storage above MDDL for which an FRL +453 ft. with MDDL + 362 ft. would obtain gross capacity of 7.44 MAF. Therefore, the Tribunal was of the view that FRL of the Sardar Sarovar Dam should be + 455 ft. providing gross storage of 7.70 MAF. It directed the State of Gujarat to take up and complete the construction of the dam.

### **B) Geological and Seismological Aspects of the Dam Site:**

The Tribunal accepted the recommendations of the Standing Committee under Central Water & Power Commission that there should be seismic co-efficient of 0.10 g for the dam.

### **C) Relief and Rehabilitation:**

The final Award contained directions regarding submergence, land acquisition and rehabilitation of displaced persons. The award defined the meaning of the land, oustee and family. The Gujarat Government was to pay to Madhya Pradesh and Maharashtra all costs including compensation, charges, expenses incurred by them for an in respect of compulsory acquisition of land. Further, the Tribunal had provided for rehabilitation of oustees and civic amenities to be provided to the oustees. The award also provided that if the State of Gujarat was unable to re-settle the oustees or the oustees being unwilling to occupy the area offered by the States, then the oustees will be re-settled by home State and all expenses for this were to be borne by Gujarat. An important mandatory provision regarding rehabilitation was the one contained in Clause XI sub-clause IV(6) (ii) which stated that no submergence of any area would take place unless the oustees were rehabilitated.

### **D) Allocation of the Narmada Waters:**

Tribunal determined the utilizable quantum of water of the Narmada at Sardar Sarovar Dam site on the basis of 75% dependability at 28 MAF. It further ordered that out of the utilizable quantum of Narmada water, the allocation between the States should be as under:

Madhya Pradesh	:	18.25 MAF
Gujarat	:	9:00 MAF
Rajasthan	:	0.50 MAF
Maharashtra	:	0.25 MAF

#### E) Period of Non Reviewability of Certain Award Terms

The Award provided for the period of operation of certain closes of the final order and decision of the Tribunal as being subject to review only after a period of 45 years from the date of the publication of the decision of the Tribunal in the official gazette. What is important to note however is that the Tribunal's decision contained in clause II relating to determination of 75% dependable flow as 28 MAF was non-review able. The Tribunal decision of the determination of the utilizable quantum of Narmada water as Sardar Sarovar Dam site on the basis of 75% dependability at 28 MAF is not a clause which is included as a clause whose terms can be reviewed after a period of 45 years.

The Tribunal in its Award directed for the constitution of an inter-State Administrative Authority i.e. Narmada Control Authority for the purpose of securing compliance with and implementation of the decision and directions of the Tribunal. The Tribunal also directed for constitution of a Review Committee consisting of the Union Minister for Water Resources) as its Chairperson and the Chief Ministers of Madhya Pradesh, Maharashtra, Gujarat and Rajasthan as its members. The Review Committee might review the decisions of the Narmada Control Authority and the Sardar Sarovar Construction Advisory Committee. The Sardar Sarovar Construction Advisory Committee headed by the Secretary, Ministry of Water Resources as its Chairperson was directed to be constituted for ensuring efficient, economical and early execution of the project.

Narmada Control Authority is a high powered committee having the Secretary, Ministry of Water Resources, Government of India as its Chairperson, Secretaries in the Ministry of Power, Ministry of Environment and Forests, Ministry of Welfare, Chief Secretaries of the concerned four States as Members. In addition thereto, there are number of technical persons like Chief Engineers as the members.

Narmada Control Authority was empowered to constitute one or more sub-committees and assign to them such of the functions and delegate such of its power as it thought fit. Accordingly, the Narmada Control Authority constituted the following discipline based sub-groups:

- (i) Resettlement and Rehabilitation sub-group under the Chairmanship of Secretary, Ministry of Welfare;
- (ii) Rehabilitation Committee under Secretary, Minister of Welfare to supervise the rehabilitation process by undertaking visits to R&R sites and submergence villages.

- (iii) Environment Sub-group under the Chairmanship of Secretary, Ministry of Environment and Forests;
- (iv) Hydroment Sub-group under the Chairmanship of Member (Civil), Narmada Control Authority;
- (v) Power Sub-group under the Chirmanship of Member (Power) Narmada Control Authority;
- (vi) Narmada main Can Sub-committee under the chairmanship of Executive Member, Narmada Control Authority.

The Award allocated the available water resources of the Narmada river between the four States. Based on this allocation, an overall plan for their utilisation and development had been made by the States. Madhya Pradesh was the major sharer of the water. As per the water resources development plan for the basin it envisaged in all 30 major dams, 135 medium dam projects and more than 3000 minor dams. The major terminal dam at Sardar Sarovar was in Gujarat, the remaining 29 being in Madhya Pradesh. Down the main course of the river, the four major dams were the Narmada Sager (now renamed as Indira Sagar), Omkareshwar and Maheshwar all in Madhya Pradesh and Sardar Sarovar in Gujarat. Rajasthan was to construct a canal in its territory to utilize its share of 0.5 MAF.

#### Relevant Details of the Sardar Sarovar Dam:

As a result of the Award of the Tribunal, the Sardar Sarovar Dam and related constructions, broadly speaking, are to comprise of the following:

- a) Main dam across the flow of the rive with gates above the crest level to regulate the flow of water into the Narmada Main Canal.
- b) An underground Rive Bed Power through which a portion of the water is diverted to generate power (1200 MW). This water joins the main channel of the Narmada river downstream of the dam.
- c) A saddle dam located lby the side of main reservoir through which water to the main canal system flows.
- d) A canal Head power House located at the toe of the saddle dam, through which the water flowing to the main canal system is to be used to generate power (250 MW).
- e) The main canal system known as Narmada main canal 458 KM. long which is to carry away the water meant for irrigation and drinking purposes to the canal systems of Gujarat and Rajasthan.

Expected benefits from the project:

The benefits expected to flow from the implementation of the Sardar Sarovar Project had been estimated as follows:

**Irrigation:** 17.92 lac hectare of land spread over 12 districts, 62 talukas and 3393 villages (75% of which is drought-prone areas) in Gujarat and 73000 hectares in the arid areas of Barmer and Jalore districts of Rajasthan.



**Drinking Water facilities** to 8215 villages and 135 urban centres in Gujarat both within and outside command. These include 5825 villages and 100 urban centers of Saurashtra and Kachchh which are outside the command. In addition, 881 villages affected due to high contents of fluoride will get potable water.

**Power Generation: 1450 Megawatt.**

Annual Employment Potential:

7 lac man-years during construction

6 lac man-years in post construction

Protection against advancement of little Rann of Kuch and Rajasthan desert.

**Flood protection** to riverine reaches measuring Bharuch city and 7.5 lac population

**Benefits to:**

- a) Dhumkhal Sloth Bear Sanctuary
- b) Wild Ass Sanctuary in Little Rann of Kachchh
- c) Blank Buck Sanctuary at Velavadar
- d) Great Indian Bustard Sanctuary in Kachchh
- e) Nal Sarovar Bird Sanctuary

**Development of fisheries:** Deepening of all viallge tanks of command which will increase their capacities, conserve water, will recharge ground water, save acquisition of costly lands for getting earth required for constructing canal banks and will reduce health hazard.

Facilities of sophisticated communication system in the entire command.

Increase in additional annual production on account of

	(Rs. in crores)
Agricultural production	900
Domestic water supply	100
Power Generation	440
<b>Total</b>	<b>1400</b>

**POST AWARD CLEARANCES:**

In order to meet the financial obligations, consultations had started in 1978 with the World Bank for obtaining a loan. The World Bank sent its Reconnaissance Mission to visit the project site and carried out the necessary inspection. In May, 1985m the Narmada Dam and Power Project and Narmada Water Delivery and Drainage Project were sanctioned by the World Bank under International Development Agency, credit No. 1552. Agreement in this respect was signed with the Bank on 10.5.1985 and credit was to be made available from 6th January, 1986.

With regard to the giving environmental clearance, a lot of discussion took place at different levels between the Ministry of Water Resources and the Ministry of Environment. Ultimately on 24th June, 1987 the Ministry of Environment and Forests, Government of India accorded clearance subject to certain conditions. The said Office Memorandum containing the environmental clearance reads as follows:-

**“OFFICE MEMORANDUM**

Subject: Approval of Narmada Sagar

Project, Madhya Pradesh and Sardar

Sarovar Project, Gujarat from environmental angle

The Narmada Sagar Project, Madhya Pradesh and Sarda Sarovar Project Gujarat have referred to this Department for environmental clearance.

On the basis of examination of details on these projects by the Environmental Appraisal Committee for River Valley Projects and discussions with the Central and State authorities the following details were sought from the project authorities:

1. Rehabilitation Master Plan
2. Phased Catchment Area Treatment Scheme
3. Compensatory Afforestation Plan
4. Survey of Flora and Fauna
6. Carrying capacity of surrounding area
7. Seismicity and
8. Health aspects.

Field surveys are yet to be completed. The firs set of information has been made available and complete details have been assured to be furnished in 1989.

The NCA has been examined and its terms of reference have been amplified to ensure that environmental safeguard measures are planned and implemented in depth and in its pace of implementation paripassu with the progress of work on the projects.

After taking into account all relevant facts the Narmada Sagar Project, Madhya Pradesh and the Sardar Sarovar Project, Gujarat State are hereby accorded environmental clearance subject to the following conditions.

- i) The NarmadaControl Authority (NCA) will ensure that environmental safeguard measures are planned and implemented pari passu with progress of work on project.
- ii) The detailed surveys/studies assured will be carried out as per the schedule proposed and details made available to the Department for assessment.
- iii) The Catchment Area treatment programme and the Rehabilitation plans be so drawn as to be completed ahead of reservoir filling.
- iv) The Department should be kept informed of progress on various works periodically.

Approval under Forest (Conservation) Act, 1980 for diversion of forest land will be obtained separately. No work should be initiated on forest area prior to this approval.

Approval from environmental and forestry angels for any other irrigation, power or development projects in the Narmada Basin should be obtained separately.

Sd/-  
(S. MUDGAL)  
DIRECTOR(IA)”

In November, 1987 for monitoring and implementation of various environmental activities effectively, an independent machinery of Environment Sub-Group was created by Narmada Control Authority. This Sub-Group was appointed with a view to ensure that the environmental safeguards were properly planned and implemented. This Sub-Group is headed by the Secretary, Ministry of Environment and Forests, Government of India, as its Chairperson and various fields relating to environment as its members.

After the clearance was given by the Ministry of Environment and Forests, the Planning Commission, on 5th October, 1988, approved investment for an estimated cost of Rs. 6406/- crores with the direction to comply with the conditions laid down in the environment clearance accorded on 24th June, 1987.

According to the State of Gujarat and Union of India, the studies as required to be done by the O.M. dated 24th June, 1987, whereby environmental clearance was accorded, have been undertaken and the requisite work carried out. The construction of the dam had commenced in 1987.

In November, 1990 one Dr. B.D. Sharma wrote a letter to this Court for setting up of National Commission for Scheduled Castes and Scheduled Tribes including proper rehabilitation of oustees of Sardar Sarovar Dam. This letter was entertained and treated as a writ petition under Article 32 of the Constitution being Writ Petition No. 1201 of 1990.

On 20th September, 1991, this Court in the said Writ Petition bearing No. 1201 of 1990 gave a direction to constitute the Committee headed by Secretary (Welfare) to monitor the rehabilitation aspects of Sardar Sarovar Project.

The Narmada Bachao Andolan, the petitioner herein, had been in the forefront of agitation against the construction of the Sardar Sarovar Dam. Apparently because of this, the Government of India, Ministry of Water Resources vide Office Memorandum dated 3rd August, 1993 constituted a Five Member Group to be headed by Dr. Jayant patil, Member, Planning Commission and Dr. Vasant Gowariker, Mr. Ramaswamy R. Iyer, Mr. L.C. Jain and Dr. V.C. Kulandaiswamy as its members to continue discussions

with the Narmada Bachao Andolan on issues relating to the Sardar Sarovar Project. Three months time was given to this Group to submit its report.

During this time, the construction of the dam continued and on 22nd February, 1994 the Ministry of Water Resources, conveyed its decision regarding closure of the construction sluices. This decision was given effect to and on 23rd February, 1994 closure of ten construction sluices was effected.

In April, 1994 the petitioner filed the present writ petition inter alia praying that the Union of India and other respondents should be restrained from proceeding with the construction of the dam and they should be ordered to open the aforesaid sluices. It appears that the Gujarat High Court had passed an order staying the publication of the report of the Five Member Group established by the Ministry of Water Resources. On 15th November, 1994, this Court called for the report of the Five Member Group and the Government of India was also directed to give its response to the said report.

By order dated 13th December, 1994, this Court directed that the report of the Five Member Group be made public and responses to the same were required to be filed by the States and the Report was to be considered by the Narmada Control Authority. This Report was discussed by the Narmada Control Authority on 2nd January, 1995 wherein disagreement was expressed by the State of Madhya Pradesh on the issues of height and hydrology. Separate responses were filed in this Court to the said Five Member Group Report by the Government of India and the Governments of Gujarat and Madhya Pradesh.

On 24th January, 1995, orders were issued by this Court to the Five Member Group for submitting detailed further report on the issues of:

- a) Height
- b) Hydrology
- c) Resettlement and Rehabilitation and environmental matters.

Dr. Patil who had headed the Five Member Group expressed his unwillingness to continue on the ground of ill-health and on 9th February, 1995, this Court directed the remaining four members to submit their report on the aforesaid issues.

On 17th April, 1985 the Four Member Group submitted its report. The said report was not unanimous, unlike the previous one, and the Members were equally divided. With regard to hydrology, Professor V.C. Kulandaiswamy and Dr. Vasant Gowariker were for adoption of 75% dependable flow of 27 MAF for the design purpose, on the basis of which the Tribunal's Award had proceeded. On the other hand, Shri Ramaswamy R. Iyer and Shri L.C. Jain were of the opinion that for planning purposes, it would be

appropriate to opt for the estimate of 23 MAF. With regard to the question relating to the height of the dam, the views of Dr. Gowariker were that the Tribunal had decided FRL 455 ft. after going into exhaustive details including social, financial and technical aspects of the project and that it was not practicable at the stage when the expenditure of Rs. 4000 crores had been incurred and an additional contract amounting to Rs. 2000 crores entered into and the various parameters and features of the project having been designed with respect to FRL 455 ft. that there should be a reduction of the height of the dam. The other three Members proceeded to answer this question by first observing as follows:

“We must now draw conclusions from the foregoing analysis, but a preliminary point needs to be made. The SSP is now in an advanced stage of Construction, with the central portion of the dam already raised to 80m.; the canal constructed upto a length of 140 Kms.; and most of the equipment for various components of the project ordered and some of it already wholly or partly manufactured. An expenditure of over Rs. 3800 crores is said to have been already incurred on the project; significant social costs have also been incurred in terms of displacement and rehabilitation. The benefits for which these costs have been and are being incurred have not materialised yet. In that situation, any one with a concern for keeping project costs under check and for ensuring the early commencement of benefits would generally like to accelerate rather than retard the completion of the project as planned. If any suggestion for a major changes in the features of the project at this juncture is to be entertained at all, there will have to be most compelling reasons for doing so.

It then addressed itself to the question whether there were any compelling reasons. The answer, they felt, depended upon the view they took on the displacement and rehabilitation problem. The two views which, it examined, were, firstly whether the problem of displacement and rehabilitation was manageable and, if it was, then there would be no case of reduction in the height. On the other hand, if relief and rehabilitation was beset with serious and persistent problems then they might be led to the conclusion that there should be an examination of the possibility of reducing submergence and displacement to amore manageable size. These three Members then considered the quotation of the magnitude of the relief and rehabilitation problem. After taking into consideration the views of the States of Madhya Pradesh and Gujarat, the three Members observed as follows:

“We find that the Government of India’s idea of phased construction outlined earlier offers a practical solution; it does not prevent the FRL from being raised to 455’ in due course if the necessary conditions are satisfied; and it enables the Government of Madhya Pradesh to take stock of the position at 436’ and call a halt if necessary. We would, however, reiterate the presumption

expressed in paragraph 3.9.2 above namely that no delinking of construction from R&R is intended and that by “phased construction” the Government of India do not mean merely tiered construction which facilitates controlled submergence in phases. We recommend phased construction in a literal sense, that is to say, that at each phase it must be ensured that the condition of advance completion of R&R has been fulfilled before proceeding to the next phase (i.e. the installation of the next tier of the gates). This would apply even to the installation of the first tier. “(while necessary) cannot be a substitute for the aforesaid condition.”

The possibility of further construction when the FRL 436 ft. was reached or a stoppage at that stage was left open by the Members. With regard to the environment it observed that this subject had been by and large covered in the first FMG report.

### RIVAL CONTENTIONS

On behalf of the petitioners, the arguments of Sh. Shanti Bhushan, learned senior counsel, were divided into four different heads, namely, general issues, issues regarding environment, issues regarding relief and rehabilitation and issues regarding review of Tribunal’s Award. The petitioners have sought to contend that it is necessary for some independent judicial authority to review the entire project, examine the current best estimates of all costs (social, environmental, financial), benefits and alternatives in order to determine whether the project is required in its present form in the national interest or whether it needs to be re-structured/modified. It is further the case of the petitioners that no work should proceed till environment impact assessment has been fully done and its implications for the projects viability being assessed in a transparent and participatory manner. This can be done, it is submitted, as a part of the comprehensive review of the project.

While strongly championing the cause of environment and of the tribals who are to be ousted as a result of the submergence, it was submitted that the environment clearance which was granted in 1987 was without any or proper application of mind as complete studies in that behalf were not available and till this is done the project should not be allowed to proceed further. With regard to relief and rehabilitation a number of contentions were raised with a view to persuade this Court that further submergence should not take place and the higher of the dam, If at all it is to be allowed to be constructed, should be considerably reduced as it is not possible to have satisfactory relief and rehabilitation of the oustees as per the Tribunal’s Award as a result of which their fundamental rights under Article 21 would be violated.

While the State of Madhya Pradesh has partly supported the petitioners inasmuch as it has also pleaded for reduction in the height of the dam so as to reduce the extent of submergence and the consequent displacement, the other

States and Union of India have refuted the contentious of the petitioners and of the State of Madhya Pradesh. While accepting that initially the relief and rehabilitation measures had lagged behind but now adequate steps have been taken to ensure proper implementation of relief and rehabilitation at least as per the Award. The respondents have, while refuting other allegations, also questioned the bona fides of the petitioners in filing this petition. It is contended that the cause of the tribals and environment is being taken up by the petitioners not with a view to benefit the tribals but the real reason for filing this petition is to see that a high dam is not erected per se. It was also submitted that at this late stage this Court should not adjudicate on the various issues raised specially those which have been decided by the Tribunal's Award.

We first propose to deal with some legal issues before considering the various submissions made by Sh. Shanti Bhushan regarding environment, relief and rehabilitation, alleged violation of rights of the tribals and the need for review of the project.

#### **LATCHES (SIC)**

As far as the petitioner is concerned, it is an anti-dam organisation and is opposed to the construction of the high dam. It has been in existence since 1986 but has chosen to challenge the clearance given in 1987 by filing writ petition in 1994. It has sought to contend that there was lack of study available regarding the environmental aspects and also because of the seismicity, the clearance should not have been granted. The rehabilitation packages are dissimilar and there has been no independent study or survey done before decision to undertake the project was taken and construction started.

The project, in principle, was cleared more than 25 years ago when the foundation stone was laid by late Pandit Jawahar Lal Nehru. Thereafter, there was an agreement of the four Chief Ministers in 1974, namely, the Chief Ministers of Madhya Pradesh, Gujarat, Maharashtra and Rajasthan for the project to be undertaken. Then dispute arose with regard to the height of the dam which was settled with the award of the Tribunal being given in 1978. For a number of years, thereafter, final clearance was not given because of the environmental concern which is quite evident. Even though complete data with regard to the environment was not available, the Government did not in 1987 finally give environmental clearance. It is thereafter that the construction of the dam was undertaken and hundreds of crores have been invested before the petitioner chose to file a writ petition in 1994 challenging the decision to construct the dam and the clearance as was given. In our opinion, the petitioner which had been agitating against the dam since 1986 is guilty of laches in not approaching the Court at an earlier point of time.

When such projects are undertaken and hundreds of crores of public money is spent, individual or organisations in

the garb of PIL cannot be permitted to challenge the policy decision taken after a lapse of time. It is against the national interest and contrary to the established principles of law that decisions to undertake developmental projects are permitted to be challenged after a number of years during which period public money has been spent in the execution of the project.

The petitioner has been agitating against the construction of the dam since 1986, before environmental clearance was given and construction started. It has, over the years, chosen different paths to oppose the dam. At its instance a Five Member Group was constituted, but its report could not result in the stoppage of construction pari passu with relief and rehabilitation measures. Having failed in its attempt to stall the project the petitioner has resorted to court proceedings by filing this writ petition long after the environmental clearance was given and construction started. The pleas relating to height of the dam and the extent of submergence, environment studies and clearance, hydrology, seismicity and other reissues, except implementation of relief and rehabilitation, cannot be permitted to be raised at this belated stage.

This Court has entertained this petition with a view to satisfy itself that there is proper implementation of the relief and rehabilitation measures at least to the extent they have been ordered by the Tribunal's Award. In short it was only the concern of this Court for the protection of the fundamental rights of the oustees under Article 21 of the Constitution of India which led to the entertaining of this petition. It is the Relief and Rehabilitation measures that this Court is really concerned with and the petition in regard to the other issues raised is highly belated. Thus it is, therefore, not necessary to do so, we however presently propose to deal with some of the other issues raised.

#### **AWARD-BINDING ON THE STATES**

It has been the effort on the part of the petitioners to persuade this Court to decide that in view of the difficulties in effectively implementing the Award with regard to relief and rehabilitation and because of the alleged adverse impact the construction of the dam will have on the environment, further construction of the dam should not be permitted. The petitioners support the contention on behalf of the State of Madhya Pradesh to the effect that the height of the dam should be reduced in order to decrease the number of oustees. In this case, the petitioners also submit that with regard to hydrology, the adoption of the figure 27 MAF is not correct and the correct figure is 23 MAF and in view thereof the height of the dam need not be 455 feet.

The Tribunal in this Award has decided a number of issues which have been summarised hereinabove. The question which arises is as to whether it is open to the petitioners to directly or indirectly challenge the correctness of the said decision. Briefly state the Tribunal had in no uncertain terms come to the conclusion that the height of the dam

should be 455 ft. It had rejected the contention of the State of Madhya Pradesh for fixing the height at a lower level. At the same time in arriving at this figure, it had considered the relief and rehabilitation problems and had issued directions in respect thereof. Any issue which has been decided by the Tribunal would, in law, be binding on the respective states. That this is so has been recently decided by a Constitution Bench of this Court in *The State of Karnataka Vs. State of Andhra Pradesh and Others*, 2000(3) Scale 505. That was a case relating to a water dispute regarding inter-State river Krishna between the three riparian States and in respect of which the Tribunal constituted under the Inter-State Water Disputes Act, 1956 had given an Award. Dealing with the Article 262 and the scheme of the Inter-State Water Disputes Act, this Court at page 572 observed as follows:

“The inter-State Water Disputes Act having been framed by the Parliament under Article 262 of the Constitution in a complete Act by itself and the nature and character of a decision made thereunder has to be understood in the light of the provisions of the very Act itself. A dispute or difference between two or more State Governments having arisen which is a water dispute under Section 2(C) of the Act and complaint to that effect being made to the Union Government under Section 3 of the said Act the Central Government constitutes a Water Disputes Tribunal for the adjudication of the dispute in question, once it forms the opinion that the dispute cannot be settled by negotiations. The Tribunal thus constituted, is required to investigate the matters referred to it and then forward to the Central Government a report setting out the facts as found by him and giving its decision on it as provided under sub-Section (2) of Section 5 of the Act. On consideration of such decision of the Tribunal if the Central Government or any State Government is of the opinion that the decision in question requires explanation or that guidance is needed upon any point not originally referred to the Tribunal then within three months from the date of the decision, reference can be made to the Tribunal for further consideration and the said Tribunal then forwards to the Central Government a further report giving such explanation or guidance as it deems fit. Thereby the original decision of the Tribunal is modified to the extent indicated in the further decision as provided under Section 5(3) of the Act. Under Section 6 of the Act the Central Government is duty bound to publish the decision of the tribunal in the Official Gazette whereafter the said decision becomes final and binding on the parties to the dispute and has to be given effect to, by them. The language of the provisions of Section 6 is clear and unambiguous and unequivocally indicates that it is only the decision of the Tribunal which is required to be published in the Official Gazette and on such publication that decision becomes final and binding on the parties.”

Once the Award is binding on the States, it will not be open to a third party like the petitioners to challenge the

correctness thereof. In terms of the Award, the State of Gujarat has a right to construct a dam upto the height of 455 ft. and, at the same time, the oustees have a right to demand relief and re-settlement as directed in the Award. We, therefore, do not propose to deal with any contention which, in fact seems to challenge the correctness of an issue decided by the Tribunal.

#### **GENERAL ISSUES RELATING TO DIS-PLACEMENT OF TRIBALS AND ALLEGED VIOLATION OF THE RIGHTS UNDER ARTICLE 21 OF THE CONSTITUTION:**

The submission of Sh. Shanti Bhushan, learned senior counsel for the petitioners was that the forcible displacement of tribals and other marginal farmers from their land and other sources of livelihood for a project which was not in the national or public interest was a violation of their fundamental rights under Article 21 of the Constitution of India read with ILO Convention 107 to which India is a signatory.

Elaborating this contention, it was submitted that this Court had held in a large number of cases that international treaties and covenants could be read into the domestic law of the country and could be used by the courts to elucidate the interpretation of fundamental rights guaranteed by the Constitution. Reliance in support of this contention was placed on *Gramophone Co. of India Ltd. Vs. B.B. Pandey*, 1984(2) SCC 534, *PUCV Vs. Union of India*, 1997(3) SCC 433 and *CERC Vs. Union of India*, 1995(3) SCC 42. In this connection, our attention was drawn to the ILO Convention, 107 which stipulated that tribal populations shall not be removed from their lands without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security or in the interest of national economic development. It was further stated that the said Convention provided that in such cases where removal of this population is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of lands previously occupied by them, suitable to provide for their present needs and future development. Sh. Shanti Bhushan further contended that while Sardar Sarovar Project will displace and have an impact on thousands of tribal families it had not been proven that this displacement was required as an exceptional measure. He further submitted that given the seriously flawed assumptions of the project and the serious problems with the rehabilitation and environmental mitigation, it could not be said that the project was in the best national interest. It was also submitted that the question arose whether the Sardar Sarovar project could be said to be in the national and public interest in view of its current best estimates of cost, benefits and evaluation of alternatives and specially in view of the large displacement of tribals and other marginal farmers involved in the project. Elaborating this contention, it was contended that serious doubts had been raised about the benefits of the project - the very rationale which was sought to justify the huge displacement and the

massive environmental impacts etc. It was contended on behalf of the petitioners that a project which was sought to be justified on the grounds of providing a permanent solution to water problems of the drought prone areas of Gujarat would touch only the fringes of these areas, namely, Saurashtra and Kutch and even this water, which was allocated on paper, would not really accrue due to host of reasons. It was contended that inspite of concentrating on small scale decentralized measures which were undertaken on a large scale could address the water problem problem of these drought prone areas. Huge portions of the State resources were being diverted to the Sardar Sarovar Project and as a result the small projects were ignored and the water problem in these areas persists. It was submitted that the Sardar Sarovar Project could be restructured to minimise the displacement.

Refuting the aforesaid arguments, it has been submitted on behalf of the Union of India and the State of Gujarat that the petitioners have given a highly exaggerated picture of the submergence and other impacts of this project. It was also submitted that the petitioner's assertion that there was large scale re-location and uprooting of tribals was not factually correct. According to the respondents, the project would affect only 245 villages in Gujarat, Maharashtra and Madhya Pradesh due to poundage and backwater effect corresponding to 1 in 100 year flooded. The State-wise break up of affected villages and the number of project affected families (PAFs) shows that only four villages would be fully affected (three in Gujarat and one in Madhya Pradesh) and 241 would be partially affected (16 in Gujarat, 33 in Maharashtra and 192 in Madhya Pradesh). The total project affected families who would be affected were 40827. The extent of the submergence was minimum in the State of Madhya Pradesh. The picture of this submergence as per the Government of Madhya Pradesh Action Plan in 1993 is as follows:

“Abdi will be fully submerged in 39 villages and partially in 116 villages, agricultural land will be affected upto 10% in 82 villages, 11 to 25% in 32 villages, 26 to 50% in 30 villages, 51 to 75% in 14 villages, 76 to 90% in 4 villages and 100% in only 1 village. In 21 villages, only abadi will be affected and Government land only in 9 villages. Thus, in most of the villages, submergence is only partial.”

The submergence area of the SSP can be divided into two areas:

- i) Fully tribal, hilly area covering the initial reach of about 105 villages with mainly subsistence economy. It includes 33 villages of Maharashtra, 19 of Gujarat and about 53 of Madhya Pradesh.
- ii) Mixed population area in the plains of Nimad, with a well developed economy and connected to the mainstream. This area includes about 140 villages in Madhya Pradesh.

These two areas have quite different topographic and

habitation features which result in totally different types of submergence impacts. The state of the hilly area to be affected by its submergence and where most of the tribal population exists is described by the Government of Madhya Pradesh Action Plan, 1993 as follows:

“The Narmada flows in hilly gorge from the origin to the Arabian Sea. The undulating hilly terrain in the lower submergence area of Sardar Sarovar Project exhibit naked hills and depleted forests. Even small forest animals are very rarely seen because of lack of forest cover and water. The oft quoted symbiotic living with forests is a misnomer in this area because the depleted forests have nothing to offer but fuel wood. Soil is very poor mostly disintegrated, granite and irrigation is almost nil due to undulating and hilly land. Anybody visiting this area finds the people desperately sowing even in the hills with steep gradient. Only one rain fed crop of mostly maize is sown and so there is not surplus economy.

PAPs inhabiting these interior areas find generous rehabilitation and resettlement packages as a means to assimilate in the mainstream in the valley.”

In 193 villages of Madhya Pradesh to be affected by the project, a very high proportion of the houses would be affected whereas the land submergence was only 14.1%. The reason for this is that the river bed is a deep gorge for about 116 km. upstream of the dam and as a result the reservoir will be long (214 km), narrow (average width of 1.77 km) and deep. The result of this is that as one goes further upstream, the houses on the river banks are largely affected while agricultural land which is at a distance from the river banks is spared. A majority of 33014 families of Madhya Pradesh (which would include 15018 major sons) would lose only their houses and not agricultural lands would be required to be resettled in Madhya Pradesh by constructing new houses in the new abadi. According to the Award, agricultural land was to be allotted only if the project affected families lost 25% or more of agricultural land and on this basis as per the Government of Madhya Pradesh, only 830 project affected families of Madhya Pradesh were required to be allotted agricultural land in madhya Pradesh.

According to the Government of Gujarat the tribals constituted bulk of project affected families who would be affected by the dam in Gujarat and Maharashtra, namely, 97% and 100% respectively. Out of the oustees of project affected families of Madhya Pradesh, tribals constituted only 30% while 70% were non-tribals. The total number of tribal project affected families were 17725 and out of these, 9546 are already re-settled. It was further the case of the respondents that in Madhya Pradesh the agricultural land of the tribal villages was affected on an average to the extent of submergence, on an average, was only 8.5%. The surveys conducted by HMS Gour University (Sagar), the Monitoring and Evaluation Agency set up by the Government of Madhya Pradesh, reveal that the major resistance to relocation was from the richer, non-

tribal families of Nimad who feared shortage of agriculture labour if the landless labourers from the areas accepted re-settlement. In the Bi-Annual report, 1996 of HMS Gour University, Sagar it was observed as follows:

“The pre-settlement study of submerging villages has revealed many startling realities. Anti-dam protagonists presents a picture that tribals and backward people are the worst sufferers of this kind of development project. This statement is at least not true in case of the people of these five affected villages. Though, these villages comprise a significant population of tribals and people of weaker sections, but majority of them will not be a victim of displacement. Instead, they will gain from shifting. The present policy of compensation is most beneficial for the lot of weaker section. These people are living either as labourers or marginal farmers. The status of oustee will make them the owner of two hectares of land and a house. In fact, it is the land-owning class which is opposing the construction of dam by playing the card of tribals and weaker sections. The land-owners are presently enjoying the benefit of cheap labour in this part of the region. availability of cheap labour is boon for agricultural activities. This makes them to get higher return with less inputs.”

It is apparent that the tribal population affected by the submergence would have to move but the rehabilitation package was such that the living condition would be much better than what it was before then. Further more though 140 villages of Madhya Pradesh would be affected in the plains of Nimad, only 8.5% of the agricultural land of these villages shall come under submergence due to SSP and as such the said project shall have only a marginal impact on the agricultural productivity of the area.

While accepting the legal proposition that International Treaties and Covenants can be read into the domestic laws of the country the submission of the respondents was that Article 12 of the ILO Convention No. 10.7 stipulates that “the populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations relating to national security, or in the interest of national economic development or of the health of the said populations.”

The said Article clearly suggested that when the removal of the tribal population is necessary as an exceptional measure, they shall be provided with land of quality at least equal to that of the land previously occupied by them and they shall be fully compensated for any resulting loss or injury. The rehabilitation package contained in the Award of the Tribunal as improved further by the State of Gujarat and the other States prima facie shows that the land required to be allotted to the tribals is likely to be equal, if not better, than what they had owned.

The allegation that the said project was not in the national or public interest is not correct seeing to the need of water

for burgeoning population which is most critical and important. The population of India, which is now one billion, is expected to reach a figure between 1.5 billion and 1.8 billion in the year 2050, would necessitate the need of 2788 billion cubic meter of water annually in India to be above water stress zone and 1650 billion cubic metre to avoid being water scarce country. The main source of water in India is rainfall which occurs in about 4 months in a year and the temporal distribution of rainfall is so uneven that the annual averages have very little significance for all practical purposes. According to the Union of India, one third of the country is always under threat of drought not necessarily due to deficient rainfall but many times fuel to its uneven occurrence. To feed the increasing population, more food grain is required and effort has to be made to provide safe drinking water, which, at present is a distant reality for most of the population specially in the rural areas. Keeping in view the need to augment water supply, it is necessary that water storage capacities have to be increased adequately in order to ward off the difficulties in the event of monsoon failure as well as to meet the demand during dry season. It is estimated that by the year 2050 the country needs to create storage of at least 600 billion cubic meter against the existing storage of 174 billion cubic meter.

Dams play a vital role in providing irrigation for food security, domestic and industrial water supply, hydroelectric power and keeping flood waters back. On full development, the Narmada has a potential of irrigating over 6 million hectares of land and generating 3000 mw of power. The present stage of development is very low with only 3 to 4 MAF of waters being used by the patty States for irrigation and drinking water against 28 MAF availability of water at 75% dependability as fixed by NWDT and about 100 MW power developed. 85% of the waters are estimated as flowing waste to sea. The project will provide safe and clean drinking water to 8215 villages and 135 towns in Gujarat and 131 villages in desert areas of Jalore district of Rajasthan, though against these only 241 villages are getting submerged partially and only 4 villages fully due to the project.

The cost and benefit of the project were examined by the World Bank in 1990 and the following passage speaks for itself:

“The argument in favour of the Sardar Sarovar Project is that the benefits are so large that they substantially outweigh the costs of the immediate human and environmental disruption. Without the dam, the long term costs for the people would be much greater and lack of an income source for future generations would put increasing pressure on the environment. If the waters of the Narmada river continue to flow to the sea unused there appears to be no alternative to escalating human deprivation, particularly in the dry areas of Gujarat. The project has the potential to feed as many as 20 million people. provide domestic and industrial water for about 30 million, employ about 1 million,

and provide valuable peak electric power in an area with high unmet power demand (farm pumps often get only a few hours power per day). In addition, recent research shows substantial economic “multiplier” effects (investment and employment triggered by development) from irrigation development. Set against the futures of about 70,000 project affected persons is well over 100: 1...” There is merit in the contention of the respondents that there would be a positive impact on preservation of ecology as a result from the project. The SSP would be making positive contribution for preservation of environment in several ways. The project by taking water to drought-prone and arid parts of Gujarat and Rajasthan would effectively arrest ecological degradation which was returning to make these areas inhabitable due to salinity ingress, advancement of desert, ground water depletion, fluoride and nitrite affected water and vanishing green cover. The ecology of water scarcity areas is under stress and transfer of Narmada water to these areas will lead to sustainable agriculture and spread of green cover. There will also be improvement of fodder availability which will reduce pressure on biodiversity and vegetation. The SSP by generating clean eco-friendly hydropower will save the air pollution which would otherwise take place by thermal generation power of similar capacity.

The displacement of the tribals and other persons would not per se result in the violation of their fundamental or other rights. The effect is to see that on their rehabilitation at new locations they are better off than what they were. At the rehabilitation sites they will have more and better amenities that which they enjoyed in their tribal hamlets. The gradual assimilation in the main stream of the society will lead to betterment and progress.

#### ENVIRONMENTAL ISSUES

The four issues raised under this head by Sh. Shanti Bhushan are as under:-

1. Whether the execution of a large project, having diverse and far reaching environmental impact, without the proper study and understanding of its environmental impact and without proper planning of mitigative measures is a violation of fundamental rights of the affected people guaranteed under Article 21 of the Constitution of India?
11. Whether the diverse environmental impacts of the Sardar Sarovar Project have been properly studied and understood?

Whether any independent authority has examined the environmental costs and mitigative measures to be undertaken in order to decide whether the environmental costs are acceptable and mitigative measures practical?

Whether the environmental conditions imposed by the Ministry of Environment have been violated and if so, what is the legal effect of the violations?

It was submitted by Sh. Shanti Bhushan that a large project having diverse and far reaching environmental impacts in the concerned States would require a proper study and understanding of the environmental impacts. He contended that the study and planning with regard to environmental impacts. He contended that the study and planning with regard to environmental must precede construction. According to Sh. Shanti Bhushan, when the environmental impacts and mitigative measures, which were required to be taken, were not available and, therefore, this clearance was not valid. The decision to construct the dam was stated to be political one and was not a considered decision after taking into account the environmental impacts of the project. The execution of SSP without a comprehensive assessment and evaluation of its environmental impacts and a decision regarding its acceptability was alleged to be a violation of the rights of the affected people under Article 21 of the Constitution of India. It was further submitted that no independent authority has examined vehemently the environmental costs and mitigative measures to be undertaken in order to decide whether the environmental practical. With regard to the environmental clearance given in June, 1987, the submission of Sh. Shanti Bhushan was that this was the conditional clearance and the conditions imposed by the Ministry of Environment and Forests had been violated. The letter granting clearance, it was submitted, disclosed that even the basic minimum studies and plans required for the environmental impact assessment had not been done. Further more it was contended that in the year 1990, as the deadline for completion of the studies was not met, the Ministry of Environment and Forests had declared that the clearance had lapsed. The Secretary of the said Ministry had requested the Ministry of Water Resources to seek extension of the clearance but ultimately no extension was sought or given and the studies and action plans continued to lag to the extent that there was no comprehensive environmental impact assessment of the project, proper mitigation plans were absent and the costs of the environmental measures were neither fully assessed nor included in the project costs. In support of his contentions, Sh. Shanti Bhushan relied upon the report of a Commission called the Independent Review or the Morse Commission. The said Commission had been set up by the World Bank and it submitted its report in June, 1992. In its report, the Commission had adversely commented on practically all aspects of the project and in relation to environment, it was stated as under:-

“Important assumptions upon which the projects are based are now questionable or are known to be unfounded. Environmental and social trade-off have been made, and continue to be made, without a full understanding of the consequences. As a result, benefits tend to be over-stated, while social and environmental costs are frequently understated. Assertions have been submitted for analysis.

We think that the Sardar Sarovar Projects as they stand are flawed, that resettlement and rehabilitation of all those displaced by the projects



is not possible under the prevailing circumstances, and that the environmental impacts of the projects have not been properly considered or adequately addressed.

The history of environmental aspects of Sardar Sarovar is a history of non-compliance. There is no comprehensive impact statement. The nature and magnitude of environmental problems and solutions remain elusive.”

Sh. Shanti Bhushan submitted that it had become necessary for some independent judicial authority to review the entire project, examine the current best estimates of all costs (social, environmental, financial), benefits and alternatives in order to determine whether the project is required in its present form in the national interest, or whether it needs to be restructured/modified.

Sh. Shanti Bhushan further submitted that environmental impacts of the projects were going to be massive and full assessment of these impacts had not been done. According to him the latest available studies and action plans had not been completed and even now they were lagging behind *pari passu*. It was also contended that mere listing of the studies does not imply that everything is taken care of. Some of the studies were of poor quality and based on improper data and no independent body had subjected these to critical evaluation.

#### **RE: ENVIRONMENTAL CLEARANCE:**

As considerable stress was laid by Sh. Shanti Bhushan challenging the validity of the environmental clearance granted in 1987 *inter alia* on the ground that it was not preceded by adequate studies and it was not a considered opinion and there was non-application of mind while clearing the project, we first propose to deal with the contention.

The events after the Award and upto the environmental clearance granted by the Government vide its letter dated 24th June, 1987 would clearly show that some studies, though incomplete, had been made with regard to different different aspects of the environment. Learned counsel for the respondents stated that in fact on the examination of the situation, the claim made with regard to the satisfactory progress was not correct. In Order to carry out the directions in the Award about the setting up of an authority, the Inter-State Water Disputes Act, 1956 was amended and Section 6-A was inserted to set out how a statutory body could be constituted under the Act. On 10th September, 1980 in exercise of the powers conferred by Section 6-A of the Act the Central Government framed a scheme, constituted the Narmada Control Authority to give effect to the decision of the Award.

In January, 1980, the Government of Gujarat submitted to the Central Water Commission a detailed project report in 14 volumes. This was an elaborate report and dealt with various aspects like engineering details, canal systems, geology of area, coverage of command area etc. On 15th

February, 1980 the Central Water Commission referred SSP to the then Department of Environment in Department of Science & Technology. At that point of time, environmental clearance was only an administrative requirement. An environmental checklist was forwarded to Government of Gujarat on 27th February, 1980 which sought to elucidate information including following ecological aspects:

- (i) Excessive sedimentation of the reservoir
- (ii) Water logging
- (iii) Increase in salinity of the ground water
- (iv) Ground water recharge
- (v) Health hazard-water borne diseases, industrial pollution etc.
- (vi) Submergence of important minerals
- (vii) Submergence of monuments
- (viii) Fish culture and aquatic life
- (ix) Plant life-forest
- (x) Life of migratory birds
- (xi) Seismicity due to filling of reservoir

The Government of Gujarat accordingly submitted information from September, 1980 till March, 1983. The information was also submitted on physio-social and economic studies for Narmada Command Area covering cropping pattern, health aspects, water requirement etc. A note of influence of Navagam dam on fish yield including impact on downstream fisheries was also submitted.

The techno-economic appraisal of the project was undertaken by the Central Water Commission which examined water availability, command area development, construction etc. The project was considered in the 22nd meeting of the Technical Advisory Committee on Irrigation, Flood Control and Multi-purpose projects held on 6.1.1983 and found it acceptable subject to environmental clearance.

At this point of time, the matter was handled by the Department of Science and Technology which also had a Department dealing with Environment. Environmental Appraisal Committee of the Department of Environment, then headed by a Joint Secretary, had in its meeting held on 12.4.1983 approved the project, in principle, and required that further data be collected. This Environmental Appraisal Committee dealt with the project on two other occasions, namely, on 29.3.1985 when it deferred meeting to await report of Dewan Committee on soil conservation and thereafter on 6.12.1985 when it deferred the meeting to await comments from the Forest Department. As stated hereafter, subsequently the Secretary of newly constituted Ministry of Environment and Forests took up further consideration of this project along with other higher officials.

After the project was approved, in principle, studies and collections of data were continuing. In May, 1983 the Narmada Planning Group, Government of Gujarat after completion of preliminary surveys submitted work plans

for various activities such as cropping pattern, health aspects, water requirements, distribution system, lay out and operation, development plan of the command, drainage and ground water development.

In July, 1983, a study report on "Ecology and Environmental Impact of Sardar Sarovar Dam and its Environs" prepared by MS University was also submitted by Government of Gujarat, covering the issues as mentioned below:

- Climate
- Geology
- Soil
- Land use
- Forest and Wildlife, Aquatic Vegetation
- Water Regime (Salinity, Tidal movements etc)
- Fisheries
- Health
- Seismicity

A review meeting was convened by the Secretary, Ministry of Water Resources in January, 1984 which was attended by a representative of the Department of Environment. During this meeting, it was emphasized that the issues regarding catchment area treatment, impact on wildlife, health, water logging etc. should be studied in depth of assessment. The issue of charging of cost of catchment area treatment to the project was also discussed. To sort out this matter, a meeting was subsequently convened by the Member, Planning Commission on 23rd May, 1984 in which the Ministry of Environment & Forests took a stand that there was a need for an integrated approach the basin development covering the catchment and command area. A project report, therefore, should be prepared to cover these aspects. Since the catchment area for Narmada Sagar and Sardar Sarovar was very vast, it was decided that an Inter-Departmental Committee should be set up by the Ministry of Agriculture under the Chairmanship of Dr. M.L. Dewan. This group could submit its report only in August, 1985 covering areas of catchment of Narmada and Sardar Sarovar and recommended that at least 25-30% of the area might require treatment for these projects.

The consideration of the project in the Ministry, therefore, got deferred for this report on catchment area treatment. During this time, Government of Madhya Pradesh entrusted the studies on flora for Narmada Valley Project to Botanical Survey of India and other related surveys were being carried out. Even though there was a request on 10th June, 1985 from the Chief Minister of Gujarat to the Minister of State for Environment and Forests for delinking of catchment areas treatment works on clearance of the project, but this request was not agreed.

By this time the approval of SSP was being considered by the Secretary, Ministry of Environment and Forests who invited other high officials in a review meeting which was held on 31st December, 1985 under his chairmanship. In

this meeting, detailed presentations were made by the State officials of Gujarat, Madhya Pradesh and Maharashtra as well as the experts who were involved in preparation of plans. The Secretary, Ministry of Environment and Forests assessed and reviewed readiness on various environmental aspects like Catchment Area Treatment, Compensatory Afforestation, Rehabilitation, Command area Development, Labour force and health issues, aquatic species, seismicity etc. and discussed the available reports in detail in the presence of the officers of the Central/State Governments, Botanical Survey of India, senior officers of Forest Department, Planning Commission, Agriculture Department, Additional. Inspector of Forests, Government of India, Deputy Inspector General, Assistant Inspector General of Forest, Government of India, senior officers of the Ministry of Environment and Forests, Secretary, Irrigation.

As a follow up, the Government of Maharashtra submitted environmental data regarding affected areas in Maharashtra. This included:

- Impact assessment on wild life
- Impact assessment on genetics, specifically identifying the plant types which are likely to be lost as a result of submergence
- Socio anthropological studies on tribals
- The suitability of alternative land suggested for compensatory afforestation for growing
- Data regarding alternative land in large blocks
- Arrangements made for exploitation of mineral resources going under submergence
- Alternative fuels to the labourers
- Micro-climatic changes
- Arrangements made for treatment of catchment area including soil conservation afforestation.
- Steps taken for preserving archaeological and historical monuments
- Proper land use
- Actions taken by Government of Maharashtra in pursuance of Dewan Committee Report
- Arrangements for monitoring for environmental impact for the project
- Data related to rehabilitation of project affected persons

The Government of Gujarat also forwarded to the Government of India work plans on the following:

Forests and Wildlife  
Fish and Fisheries  
Health aspects

The work plan on forests and wildlife incorporated actions to be taken on the recommendations of the Inter-Departmental Committee headed by Dr. Dewan on soil conservation and afforestation works in the catchment area.

In march, 1986, a meeting was convened by the Ministry of Water resources in order to discuss the issues of fisheries, floral/fauna, health, archaeology with the officers of the

Botanical Survey of India, Zoological Survey of India and the officers of the various departments of the State and Centre to gear up the preparation of the environmental work plans. The next meeting was held on 11th April, 1986. The Secretary, Ministry of Environment and Forests, who chaired the meeting of senior officials, representatives of States and other agencies, sought additional information to be made available by 30th April, 1986 before assessment and management decision.

In October, 1986, the Ministry of Water Resources prepared and forwarded to the Ministry of Environment and Forests, a note on environmental aspects of the two projects and noted the urgency of the decision. It also considered the importance of the project, should the project be taken at all, environmental aspects of the project and ultimately rehabilitation, compensatory afforestation, fauna and flora, catchment area treatment, public health aspect, prevention of water logging. It then considered what remained to be done and enumerated the same with time schedule as follows:

1. Madhya Pradesh to complete the detailed survey of population likely to be affected in all phases of N.S.P. ... Three years
2. Maharashtra to prepare a detailed rehabilitation plan for 33 villages under phase 1 of SSP.
3. Madhya Pradesh to identify degraded forest lands twice the forest areas to be submerged for compensatory afforestation. ... Six months
4. Survey of flora in Narmada valley assigned to Botanical Survey of India. ... Two years
5. Survey of Wildlife by Zoological Survey of India. ... Two years
6. Aerial photographs and satellite imagery to be analysed by All India Soil and Land Use Survey Organisation and National Remote Sensing Agency and critically degraded areas in catchment.
 

Field Surveys	... Three years
Pilot studies to determine measures for CAT	
In 25000 ha.	... Three years after Aerial Survey

In this note two options were considered - one to postpone the clearance and the other was to clear it with certain conditions with appropriate monitoring authorities to ensure that the action is taken within the time bound programme. It was concluded that in the light of the position set out, it was necessary that the project should be cleared from the environmental angle, subject to conditions and stipulations outlined.

The Department of Environment and Forests made its own assessment through a note of the Secretary, Ministry of Environment and Forests. It took the view that following surveys/studies as set out therein might take at least 2-3 years. It noted in this regard that:

- (i) The estimate of Ministry of Water Resources on

analysis of aerial photographs and satellite imageries as 2-3 years.

- (ii) Catchments area treatment programme can be formulated by three years thereafter.
- (iii) Wildlife census by Zoological Survey of India would take at least three years;
- (iv) Survey by Botanical Survey of India would take three years.

It further took the view that it was essential that there would be a strong management authority. It finally concluded that if the Government should decide to go ahead with the project it should be done with provision of environmental management authority with adequate powers and teeth to ensure that environment management is implemented *pari passu* with engineering and other works. It concluded that effective implementation of the engineering and environmental measures simultaneously will go along way and that such a project could be implemented by harmonizing environmental conservation needs with the developmental effort.

The Ministry of Environment and Forests had not given environmental clearance of Narmada Sagar and Sardar Sarovar Dam despite all discussions which had taken place. The documents filed along with the affidavit of Shri P.K. Roy, Under Secretary, Prime Minister's Office dated 27th April, 2000 indicate that there was difference of opinion with regard to the grant of environment & Forests. This led to the matter being referred to the Prime Minister's Secretariat for clearance at the highest level. A note dated 20th November, 1986 prepared by the Ministry of Water Resources was forwarded to the Prime Minister Secretariat as well as to the Ministry of Environment and Forests after dealing with the environmental aspects relating to rehabilitation, catchment area treatment, command area development, compensatory afforestation, flora and fauna. This note indicated that there were two options with regard to the clearance of the said project. One was to await for two to three years for the completion of the operational plans and other detailed studies and the second option was that the project should be given the necessary clearance subject to the stipulation with regard to the action to be taken in connection with various environmental aspects and appropriate monitoring arrangements to ensure that the actions were taken in time bound manner. The Ministry of Water Resources recommended that it should be possible to give environmental clearance of the project and ensure that the conditions are properly met through a process of clear assignment of responsibility and frequent monitoring. The *modus operandi* for instituting a monitoring system could be discussed at the meeting.

On 26th November, 1986, a meeting took place which was attended, *inter alia*, by the Secretary, Ministry of Water Resources, Secretary, Ministry of Environment & Forest, Additional Secretary, Prime Minister Secretariat and representatives of the Governments of Madhya Pradesh and Gujarat regarding the environmental aspects of the

Narmada Sagar and Sardar Sarovar Project. The minutes of the meeting, inter alia, disclosed “ it was decided that the Government of Gujarat would identify lands for allocation to the project affected persons of Madhya Pradesh within a specified period of time. The meeting also envisaged the arrangement of a Monitoring and Enforcement Authority to monitor the project and to ensure that the actions on the environmental aspects proceed according to the schedule and pari passu with the rest of the project”. This Authority was not to be mainly advisory one but was to be given executive powers of enforcement including the power to order stoppage of construction activity in the event of its being of the opinion that there was lack of progress in action on the environmental front.

On 19th December, 1986, the Secretary, Ministry of Environment and Forest sent to the Secretary to the Prime Minister a combined note on the environmental aspects of both the projects, namely, Narmada Sagar and Sardar Sarovar Project. In this note, it was, inter alia, stated that there was absence and inadequacy on some important environmental aspects even though the Sardar Sarovar Project was in a fairly advance stage of preparedness. The note also recommended the establishment of the Narmada

Management Authority with adequate powers and teeth to ensure that the Environmental Management Plan did not remain only on paper but was implemented; and implemented pari passu with engineering and other works. In the end, in the note, it was stated as follows:

“If, despite the meagre availability of data and the state of readiness on NSP, the Government should decide to go ahead with the project it is submitted that it should do so only on the basis of providing a Management Authority as outlined above with the hope that the public opposition, not just be vested interests but by credible professional environmentalists, can be overcome. Effective implementation of the engineering and environmental measures simultaneously would go a long way to prove that even such a project can be implemented by harmonising environmental conservation needs with the development effort.

The Choice is difficult but a choice has to be made.”

A long with his note was the statement showing the cost and the benefits of the Narmada Sagar and the Sardar Sarovar dam. The same reads as in the following table.

“COSTS	NARMADA SAGAR	SARDAR SAROVAR
1. Dam construction (1981 price level)	Rs. 1400 crores (1982 price level)	Rs. 4240 crores
2. Loss of forest	Rs. 320 crores	
3. Environmental cost of loss of forests	Rs. 30923 crores	+ -Rs. 8190 crores
4. Catchment Area development	Rs. 300 crores	Not available
5. Command area development Rs. 300.0 crores (conjunctive use)	Rs. 243.7 crores	Rs. 604.0 crores
6. Loss of Mineral Resources	-	-
7. Diversion of 42 km Railway line	-	-
8. Population affected 86572 (Excluding population with land submerged for short period every year)	129396 (1981 census)	
9. Land submerged	91348 ha	39134 ha
<b>Benefits</b>		
10. Area irrigated	123000 ha	1792000 ha
Net culturable land	140960 ha	2120000 ha
11. Power Generations 1000 MW (Installed capacity) 118.3 MW in 2023 A.D.”	223.5 MW (firm power) 1450 (Installed)	300MW

After a series of meetings held between the Secretary to Prime Minister's office as well as the Ministry of Water Resources, a detailed note dated 15th January, 1987 was prepared by Mrs. Otima Bordia, Additional Secretary to the Prime Minister. The notes opened by saying that Narmada Sagar and Sardar Sarovar multipurpose projects have been pending approval of the Government of India for a considerable amount of time. The States of Madhya Pradesh and Gujarat have been particularly concerned and have been pressing for their clearance. The main issues of environmental concern related to the rehabilitation of the affected population, compensatory afforestation, treatment of the catchment area, command area development pertaining particularly to drainage, water logging and salinity. The said note mentioned that the Department of Environment and Forests had sent a note with the approval of the Minister for Environment and Forests and had recommended conditional approval to the Narmada Sagar and Sardar Projects subject to three conditions:

- (i) Review of design parameters to examine the feasibility of modifying the height of the dam;
- (ii) Preparation in due time, detailed and satisfactory plans for rehabilitation, catchment area treatment, compensatory afforestation and command area development;
- (iii) Setting up of Narmada Management Authority with adequate powers and tech to ensure that environmental management plans are implemented pari passu with engineering and other works.

It is further stated in the note that the Ministry of Water Resources and the State Governments had no difficulty in accepting conditions (ii) and \*(iii). With regard to review of design parameters and dam height, the Ministry of Water Resources had examined the same after taking into consideration the comments of the Central Water Commission and concluded that the reduction of the FRL of the Narmada Sagar project would not be worthwhile. The Secretary to the Prime Minister had discussed the matter with the Secretary, Ministry of Water Resources and Secretary, Ministry of Environment and Forests and it was agreed that the recommendation of the Minister of Environment and Forests of giving clearance on the condition that items (ii) and (iii) referred to hereinabove be accepted. The note also stated that in view of the technical report, reduction in the dam height did not appear to be feasible. This note of Mrs. Otima Bordia recommended that the Prime Minister's approval was sought on giving conditional clearance. On this note, Mrs. Serla Grewal, Secretary to the Prime Minister noted as follows:-

“Proposal at para 17 may kindly be approved. This project has been pending clearance for the last 7 years and both the C.Ms of Gujarat and Madhya Pradesh are keenly awaiting the clearance of the same. The agency, which is proposed to be set up to monitor the implementation of this project, will fully take care of the environmental

degradation about which P.M. was concerned. The Ministry of Environment and Forests have recommended clearance of this project subject to conditions which will take care of P.M's apprehensions. I shall request Secretary, Water Resources, who will be Chairman of the Monitoring Agency, to see that no violation of any sort takes place and P.M's office will be kept informed of the progress of this project every quarter. The matter is urgent as last week C.M. Gujarat had requested for green signal to be given to him before 20th January. P.M. may kindly approve.”

The Prime Minister Shri Rajiv Gandhi, instead of giving the approval, made the following note:

“Perhaps this is a good time to try for a River Valley Authority. Discuss”

It appears that the Ministry of Environment and Forests gave its clearance to the setting up of Inter-Ministerial Committee and on 8th April, 1987, following note was prepared and forwarded to the Prime Minister.

“This case has got unduly delayed. P.M. was anxious that speedy action should be taken. As such, since the Ministry of Environment has given its clearance subject to setting up of an Inter-Ministerial Committee as indicated at `A' above, we may give the necessary clearance. The three Chief Ministers may be requested to come over early next week to give their clearance in principle for the setting up of a River Valley Authority so that simultaneous action can be initiated for giving practical shape to this concept. The clearance of the project, however, should be communicated within two weeks as I have been informed by Shri Shiv Shanker and Shri Bhajan Lal that interested parties are likely to start an agitation and it is better if clearance is communicated before mischief is done by the interest parties.”

Along with another affidavit of Shir P.K. Roy, Under Secretary, Prime Minister's Office dated 22nd May, 2000, some correspondence exchanged between legislature and the Prime Minister has also been placed on record relating to the granting of the environmental clearance by the Prime Minister. On 31st March, 1987, Shri Shanker Sing Vaghela, the then Member of Parliament, Rajyah Sabha had written a letter to the Prime Minister in which it was, inter alia, stated that the foundation stone for the Narmada Project had been laid 25 years ago by the late Pandit Jawahar Lal Nehru and that after the Tribunal's Award, Mrs. Indira Gandhi had cleared the project in 1978, but still the environmental clearance had not so far been given. It was also stated in his letter that the project was now being delayed on account of so-called environmental problems. It was further stated in his letter that the Sardar Sarovar Project, when completed, will solve more of the pressing problems of environment than creating them. To this letter of Shri Vaghela, the Prime Minister sent a reply dated 8th April, 1987 stating as follows:

“I have seen your letter of 31st March regarding the Narmada Project. All aspects have to be carefully considered before decisions are taken on a project of this size. This is being done.

The environment and ecological factors cannot be dis-regarded. We cannot also dismiss the needs of our tribal people. Safeguards are required to ensure that rehabilitation plans are effective. All these aspects are being examined and a decision will be taken soon.”

On 30th April, 1987, a press note was released by the Government of India, in which it was stated that in a meeting presided over the Prime Minister, it was agreed by the Chief Ministers of Madhya Pradesh and Gujarat and representatives of the Maharashtra Government that a high level River Valley Authority would be set up for the control and development of the river basin. This press note also stated that the Narmada Sagar and the Sardar Sarovar Project on the river Narmada had been cleared. Soon, thereafter Shri Ahmad Patel, Member of Parliament from Gujarat wrote a letter dated 14th April, 1987 to Shri Rajiv Gandhi expressing his gratitude for according clearance to the Narmada multi-purpose project. This letter was replied to on 22nd April, 1987 by Shri Rajiv Gandhi who thanked Shri Patel for writing his letter dated 14th April, 1987 regarding the Narmada project. On 20th April, 1987, Shri Shanker Singh Vaghela wrote another letter to the Prime Minister. While thanking him for clearing the project, it was stated that there was apprehension about the environment and ecological factors and also about the needs of the tribal people. The Prime Minister was requested “to clarify to the people of Gujarat whether or not these aspects have finally been cleared or not and all the doubts on this front have been finally set at rest or not.” On 4th May, 1987 the Prime Minister replied to the letter in which it was stated as follows:

There should be no grounds for any misunderstanding in this regard. The Narmada Project has been cleared while at the same time ensuring that environmental safeguards will be enforced and effective measures taken for the rehabilitation of the tribals. You could ask the Ministry of Water Resources or the State Government for details.”

Lastly, we need make reference to a letter dated 10th June, 1987 written by Smt. Chandraben Sureshbhai Shrimali, an M.L.A. of Gujarat and the reply of the Prime Minister thereto. In the said letter dated 10th June, 1987, Smt. Shrimali thanked the Prime Minister for clearing the Narmada project and it was stated that the dry land of Gujarat and Saurashtra would be fertilised through Narmada Yojna. To this, reply dated 30th June, 1987 of the Prime Minister was as follows:

Thank you for your letter of 10th June. The visit to Surendranagar was useful and educative. We are all looking forward to the early implementation

of the Sardar Sarovar project. The question of environmental protection also needs serious attention. I wish you and the people of Surendranagar a good monsoon.

From the documents and the letters referred to hereinabove, it is more than evident that the Government of India was deeply concerned with the environmental aspects of the Narmada Sagar and Sardar Sarovar Project. Inasmuch as there was some difference of opinion between the Ministries of Water Resources and environmental & Forests with regard to the grant of environmental clearance, the matter was referred to the Prime Minister. Thereafter, series of discussions took place in the Prime Minister’s Secretariat and the concern of the Prime Minister with regard to the environment and desire to safeguard the interest of the tribals resulted in some time being taken. The Prime Minister gave environmental clearance on the 13th April, 1987 and formal letter was issued thereafter on 24th June, 1987.

It is not possible, in view of the aforesaid state of affairs, for this Court to accept the contention of the petitioner that the environmental clearance of the project was given without application of mind. It is evident, and in fact this was the grievance made by Shri Vaghela, that the environmental clearance of the project was unduly delayed. The Government was aware of the fact that number of studies and data had to be collected relating to environment. Keeping this in mind, a conscious decision was taken to grant environmental clearance and in order to ensure that environmental management plans are implemented pari passu with engineering and other works, the Narmada Management Authority was directed to be constituted. This is also reflected from the letter dated 24th June, 1987 of Shri Mudgal giving formal clearance to the project.

#### **RE: OTHER ISSUES RELATING TO ENVIRONMENT**

Prior to the grant of the environmental clearance on 24th June, 1987, sufficient studies were made with regard to different aspects of environment on the basis of which conditional clearance was granted on 24th June, 1987, one of the condition of clearance being that the balance studies should be completed within a stipulated time frame. According to the Government of Gujarat, the conditions imposed in the environmental clearance granted on June 24, 1987 were:

- (a) The NCA would ensure that the environmental safeguard measures are planned and implemented pari passu with the progress of work on the project.
- (b) The detailed survey/studies assured will be carried out as per the schedule proposed and details made available to the department for assessment.
- (c) The catchment area treatment progame and rehabilitation plans ge so drawn so as to be completed ahead of reservoir filling.
- (d) The department should be informed of progress on various works periodically.

It was further submitted by the Government of Gujarat that none of these conditions were linked to any concrete time frame.

- (a) The first condition casts a responsibility on the NCA to ensure that the environmental aspects are always kept in view. The best way to attain the first and the fourth condition - was to create an environmental sub-group headed by the Secretary in the Ministry of Environment and Forest.
- (b) The second condition - the conducting of surveys by its very nature - could not be made time bound. The surveys related to various activities to undo any damage or threat to the environment not only by the execution of the project but in the long term. Therefore, any delay in the conduct of surveys was not critical. Besides, a perusal of the latest status report on environment shows that a large number of surveys were carried out right from 1983 and also after 1987.
- (c) The third condition has already stood fully complied with as observed by Environment Sub-Group.
- (d) The fourth condition again involved keeping the department informed.

It was submitted that the concept of “lapsing” is alien to such conditions. In other words, formal environmental and forest clearances granted by the ministry of Environment and Forests, Government of India are not lapsed and are very much alive and subsisting.

With regard to the lapsing of the clearance granted in 1987, it was contended by Mr. Hrish Salve that a letter dated 25th May, 1992 was written by the Secretary, Ministry of Environment and Forests, Government of India to the Secretary, Ministry of Water Resources stating, inter alia, that the conditions of clearance of the project were not yet met and, therefore, a formal request for extension of environmental clearance, as directed by Review Committee of Narmada Control Authority, may be made and failing which, a formal notification may be issued revoking the earlier clearance. It is, however, an admitted position that no formal notification has ever been issued revoking and/or canceling the aforesaid two clearances at any point of time by the Ministry of Environment and Forests, Government of India. The Secretary, Ministry of Environment and Forests has continued to hold and chair the meetings of Environment Sub-Group, Narmada Control Authority closely monitoring the execution of SSP for ensuring that environmental safeguard measures are implemented *pari passu* with the progress of work. on 11th August, 1992, a letter was written by Narmada Control Authority to the Secretary, Ministry of Environment and Forest, sending action plan and status in respect of environmental safeguard measures taken and also stating amongst other details, the following:

“A number of letters were exchanged between the MOWR and MOER and a great deal of discussion took place both in the Environment Sub-Group

and NCA as to whether an application for extension of time as a above is at all necessary. After a detailed discussion in the last NCA meeting on 25th July, 1992, it has been decided that NCA should clearly indicate the additional time required for the completion of the remaining studies like flora and fauna and some aspects of fisheries and a revised action plan based thereon be also sent expeditiously.”

XXXXXX

XXXXXX

“Keeping in view the fact and circumstances mentioned above, I request you to kindly agree to the schedule of the studies and the follow up actions as presented here. A brief account of the action plan together with bar charts are enclosed, presenting a pictorial view.”

On the 15th December, 1992, a letter was written to the Secretary, Ministry of Environment and Forests, more particularly stating as under, amongst other things.

“The Narmada Control Authority has already prepared an action plan and status on the environmental measures of Sardar Sarovar Project and submitted to the Ministry of Environment and Forests vide their letter No. NCA/EM/683 dated 11.8.1992 for concurrence. As may be seen from their report on action, so far there is not safeguard measures.

During field season of every year this will be closely reviewed to attain *pari passu* objectives so that the submergence during monsoon is taken care of.

The above actions are scheduled to be completed by June, 1993. No doubt, action in maharashtra is lagging. The matter was taken up with the Chief Secretary of Maharashtra. A copy of his reply dated 7.11.1992 is enclosed. You will observe that the reasons for the lag are largely due to the uncooperative and agitation approach adopted by some people.

Taking all these into account, your will appreciate that the action plans are adequate.”

The Minister for Water Resources, Government of India wrote a letter on 27th January, 1993 to the Minister of State for Environment and Forests stating that there has been no violation of environmental safeguard measures. On 7th July, 1993, the Secretary, Ministry of Water Resources, Government of India wrote a letter to the Secretary, Ministry of Environment and Forests, Government of India, more particularly stating as under:

“Progress of all the environmental works is summarised in the sheet enclosed herewith. I share your concern for initial delay in some of the studies but now it seems that the work has started in full swing. However, there is a need to keep a close watch and I am advising the NCA for the sam.”

By letter dated 17th September, 1993, the Minister of State for Environment and Forests, Government of India appreciating the efforts made by the concerned State Governments in making the environmental plans. The exchange of the aforesaid correspondence and the conduct of various meetings of the Environment Sub-group from time to time under the Chairmanship of the Secretary, Ministry of Environment and Forests, dispels the doubt of the environment clearance having been lapsed. In other words, there could not have been any question of the environmental clearance granted SSP being lapsed more particularly when the Environment Sub-group had been consistently monitoring the progress of various environmental works and had been observing in its minutes of various meetings held from time to time, about its analysis of the works done by the respective States in the matter of the status of studies, surveys and environmental action plans in relation with:

- (i) phased catchment area treatment;
- (ii) compensatory afforestation;
- (iii) command area development;
- (iv) survey of flora, fauna etc.;
- (v) archeological and anthropological survey;
- (vi) seismicity and rim stability of reservoir;
- (vii) health aspects and
- (viii) fisheries development of SSP and NSP reservoirs.

Sh. Shanti Bhusham in the course of his submissions referred to the report of the Morse Committee in support of his contentions that the project was flawed in more way than one.

The Morse Committee was constituted, as already noted, by the World Bank. Its recommendations were forwarded to the World Bank. A part from the Criticism of the report from other quarters, the World Bank itself, did not accept this report as is evident from its press release dated 22nd June, 1992 where it was, inter alia, stated as follows:

“The Morse Commission provided a draft of its report to the Bank for management’ comments several weeks prior to the final release of the document. About two weeks before this release, the commission provided a draft of its findings and recommendations. The final version of the report is the sole responsibility of its authors; the report was not cleared by the World Bank.

On resettlement and rehabilitation (R&R), Bank management agrees with the description of the R&R situation in each of the three states and with the report’s conclusions about the shortcomings in the preparation and appraisal of the project’s R&R aspects. We also agree that work should have been done earlier on the issue of people affected by the canal in Gujarat. However, we do not share the view that resettlement would be virtually impossible even if Maharashtra and Madhya Pradesh adopted the liberal resettlement package provided for displaced people by the State of

Gujarat. Given the experience so far, and the fact that most of the impact of submergence on people will not occur until 1997, there is still time to develop meaningful R&R packages and programs in consultation with the affected peoples. Efforts are being intensified to achieve this.

On environment, bank management agrees with the independent review on the need for a more effective central management in the Narmada Basin on environment impact studies and mitigation programmes. Management also agreed on the need to accelerate work on estuary studies and health matters in Gujarat. However, management does not share the review’s conclusions about the environmental severity of the study delays. Command area issues are being addressed, including issues of water logging and salinity. On water availability (hydrology), Bank Management disagrees with the finding that there is insufficient impoundment of water upstream of the Sardar Sarovar Dam site to make the irrigation system work as designed.”

The Government of India vide its letter dated 7th August, 1992 from the Secretary, Ministry of Environment and Forests did not accept the report and commented adversely on it.

In view of the above, we do not propose, while considering the petitioners’ contentions, to place any reliance on the report of Morse Committee.

It was submitted on behalf of the petitioners that the command area development was an important aspect as the benefits of the project depended on this and if proper studies and plans were not done and not implemented, the very areas that were supposed to benefit will end up being rendered unfit for cultivation and the water logging and salinisation could refer vast areas of the command unproductive. It was also submitted that still there was not integrated command area environmental impact assessment. After refereeing to the status reports and studies regarding the command area development, it was submitted that there was need for some independent agency to examine the various studies, action plans and the experience and to see whether there was ground to believe that the proposed measures will work or not. It was contended that master plan for drainage and command area development was still not in place and even the full studies had not been done.

While refuting the aforesaid contentions it was argued on behalf of learned counsel for the respondents that the SSP will provide irrigation water for a cultivable command area of 1.9 million hectares in Gujarat and 75,000 hectares in Rajasthan. The introduction of fresh water to the drought-prone areas of Gujarat will create obvious benefits for the farming communities. In order to safeguard these benefits, control and monitoring was suggested by the Secretary, Ministry of Environment and Forests and Chairman of the Environment Sub-group in the following areas from time to time:



- drainage, water logging and soil salinity;
- water quality;
- forest loss;
- potential impact on flora and fauna;
- effects on public health;
- socio-economic impacts.

Pursuant thereto fifty-in-depth studies had been carried out by the State Governments of Gujarat and Rajasthan and some of the studies were still in progress. One of the main objectives of carrying out these studies was to prevent excessive use of ground water and water-logging.

There is no reason whatsoever as to why independent experts should be required to examine the quality, accuracy; recommendations and implementation of the studies carried out. The Narmada Control Authority and the Environmental Sub-group in particular have the advantage of having with them the studies which had been carried out and there is no reason to believe that they would not be able to handle any problem, if and when, it arises or to doubt the correctness of the studies made.

It was submitted by Sh. Shanti Bhushan that the catchment area treatment programme was not to be done *pari passu* but was required to be completed before the impoundment. This contention was based on the terms of the letter dated 24th June, 1987 wherein conditional environmental clearance was granted, *inter alia*, on the condition that “the catchment area treatment programme and rehabilitation plans be drawn so as to be completed ahead of reservoir filling.” Admittedly, the impounding began in 1994 and the submission of Sh. Shanti Bhushan was that catchment area treatment programme had not been completed by them and, therefore, this very important condition had been grossly violated. Reference was also made to the Minutes of the Environmental Sub-group meetings to show that there had been slippage in catchment area treatment work.

The clearance of June, 1987 required the work to be done *pari passu* with the construction of the dams and the filling of the reservoir. The area wherein the rainfall water is collected and drained into the river or reservoir is called catchment area and the catchment area treatment was essentially aimed at checking of soil erosion and minimising the silting in the reservoir within the immediate vicinity of the reservoir in the catchment area. The respondents had proceeded on the basis that the requirement in the letter of June, 1987 that catchment area treatment programme and rehabilitation plans be drawn up and completed ahead of reservoir filling would imply that the work was to be done *pari passu*, as far as catchment, area treatment programme is concerned, with the filling of reservoir. Even though the filling of the reservoir started in 1994, the impoundment Award was much less than the catchment area treatment which had been affected. The status of compliance with respect to *pari passu* conditions indicated that in the year 1999, the reservoir level was 88.0 meter, the impoundment areas was 6881 hectares (19%)

and the area where catchment treatment had been carried out was 128230 hectares being 71.5% of the total work required to be done. The Minutes of the Environmental Sub-group as on 28th September, 1999 stated that catchment area treatment works were nearing completion in the states of Gujarat and Maharashtra. Though, there was some slippage in Madhya Pradesh, however, overall works by and large were on schedule. This clearly showed that the monitoring of the catchment treatment plan was being done by the Environmental Sub-group quite effectively.

With regard to compensatory afforestation it was contended by Sh. Shanti Bhushan that it was being carried out outside the project impact area. Further, it was submitted that the practice of using waste land or lesser quality land for compensatory afforestation means that the forest will be of lesser quality. Both of these together defeated the spirit of the compensatory afforestation. It was contended that the whole compensatory afforestation programme was needed to be looked at by independent experts.

While granting approval in 1987 to the submergence of forest land and/or diversion thereof for the SSP, the Ministry of Environment and Forest had laid down a condition that for every hectare of forest land submerged or diverted for construction of the project, there should be compensatory afforestation on one hectare of non-forest land plus reforestation onto hectare of degraded forest. According to the State of Gujarat, it had fully complied with the condition by raising afforestation in 4650 hectares of non-forest areas and 9300 hectares in degraded forest areas before 1995-96 against the impoundment area of 19%. The *pari passu* achievement of afforestation in Gujarat was stated to be 99.62%.

If afforestation was taking place on waste land or lesser quality land, it did not necessarily follow, as was contended by the petitioners, that the forests would be of lesser quality or quantity.

It was also contended on behalf of the petitioners that downstream impacts of the project would include not only destruction of downstream fisheries, one of the most important ones in Gujarat on which thousands of people are dependent but will also result in salt water ingress. The project, it was contended, will have grave impacts on the Narmada Estuary and unless the possible impacts were properly studied and made public and mitigation plans demonstrated with the requisite budget, one could not accept the claim that these matters were being looked into. The need to assess the problem was stated to be urgent as according to the petitioners rich fisheries downstream of the dam, including the famed Hilsa would be almost completely destroyed. The salinity ingress threatened the water supply and irrigation use of over 210 villages and towns have serious economic and other impacts but would also directly destroy the livelihoods of at least 10000 fisher families.

Again all these contentions were based on the Morse Committee Report which the World Bank and the Union of India had already rejected. That apart, according to the respondents, in 1992 Sardar Sarovar Narmad Nigam Limited issued an approach paper on environmental impact assessment for the river reach downstream. This provided technical understanding of the likely hydrological changes and possible impact in relation thereto. It was further submitted by learned counsel for the respondents that the potential for environmental changes in the lower river and estuary had to be seen in the context of the long term development of the basin. The current stage was clearly beneficial. The three stages could be identified as follows:

Stage 1 covers the period roughly from the completion of Sardar Sarovar Dam to the year 2015. Events occurring during this stage include (a) SSP Canal Command will have reached full development and requires diversion of some water, (b) the upstream demand will reach about 18 MAF and (c) the Narmada Sagar Dam will have been built and placed in operation.

Stage 2 covers the period from 2015 and 2030 during which the demands upstream of SSP continue to grow and will reach about 12 MAF still below the volume of 18 MAF that Madhya Pradesh can take in a 75% year.

Stage 3 covers the period upto and beyond full basin development.

The report given by M/s. H.R. Wallingford in March, 1993 in respect of the down stream impacts of Sardar Sarovar Dam observes, inter alia, as under:

“The overall conclusion of the team undertaking the assessment described in this report is that there are no down stream impacts whose magnitude and effect are such as to cause doubts to be cast over the wisdom of proceeding with the Sardar Sarovar Projects provided that appropriate monitoring and mitigation measures are applied. Much of this work is already in progress under the auspices of the NPG, SSNNL and NCA. The recommendations in this report are intended to provide a synthesis of their work and suggestions as to whether it might be modified to enhance its usefulness.”

The said M/s H.R. Wallingford in the findings of 1995 stated as under:

“It is thought unlikely that any significant negative environmental impacts will occur over the next 30 years as a result of the project. Some possible adverse effects have been identified the main one being the effect of flood attenuation of Hilsa migration. These needs to be monitored and more studies undertaken to better understand the conditions which trigger spawning. Beneficial impacts in this period include reduced flooding and more reliable dry season flows as well as an overall improvement of the health and well being of the people to the reliable domestic water supply,

improved nutrition and enhanced economic activity.”

The above report clearly demonstrates that the construction of dam would result into more regulated and perennial flow into the river with an overall beneficial impact. It is also evident that until all the dams are constructed upstream and the entire flow of river is harnessed, which is not likely in the foreseeable future, there is no question of adverse impact including the fishing activity and the petitioner's assertions in this regard are ill-conceived.

The area of submergence was stated to be rich historical legacy being lost and even a small increase in the dam height would threaten to submerge many of the sites listed in the report of the Archaeological Survey of India. There were stated to be five monuments which would be affected at the dam height of 90 meter or above and no work was stated to have commenced to protect any of the five monuments.

According to the State of Gujarat, the Ancient Monuments and Archaeological Sites and Remains Act, 1958 charged the Central and/or State Department of Archeology with responsibility for the protection of important cultural sites. Under the Act, sites were classified into three categories as follows:

- Type 1: Monuments of national importance which are protected by the Central Government;
- Type 2: Monuments of religious or cultural importance which are protected by the State Government; and
- Type 3: Monuments which are neither centrally nor State protected, but which are considered to be an important part of cultural heritage.

Under the same law, authorities charged with the protection of the monuments are permitted to take suitable measures to ensure the preservation of any protected site under threat from decay, misuse or economic activity.

In the case of Sardar Sarovar, where several sites may be submerged, the NDWT award stipulated that the entire cost of relocation and protection should be chargeable to Gujarat. Relocation work was to be supervised by the Department of Archaeology under the provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958.

The three State Governments carried out a complete survey of cultural and religious sites within the submergence zone. The principle of these surveys was to list all Archeological sites, identify and name any site under state protection and further identify sites of religious or cultural significance which, although not protected under national law, were of sufficient value to merit relocation. So far as the State of Gujarat is concerned the Department of Archaeology surveyed archeological sites in nineteen villages of

submergence zone in Gujarat under the title of “Archaeological Survey of Nineteen Villages in Gujarat submerged by Sardar Sarovar Reservoir, 1989.”

In addition to baseline studies on archaeological aspects, work had been carried out on the anthropological heritage of Narmada Basin, including examination of evidence of ancient dwellings and cultural artifacts. The principal studies in this behalf are described below:

**Anthropological Survey of India: Narmada Salvage Plan:** The Narmada Salvage Plan contains detailed background data on palaeoanthropological, human ecological and other aspects of the Narmada Valley. By May, 1992, surface scanning of 17 sample villages coming under the submergence had been carried out and 424 specimens including ancient tools etc. had been collected.

**Anthropological Survey of India. Peoples of India:** This project entailed a complete survey of 33 tribes of India including those of Narmada Basin. The study covered all aspects of tribal culture in India and was published in 61 volumes in 1992.

It was further submitted on behalf of respondents that no centrally or state protected cultural sites were located in the submergence area of the project. In Gujarat, the Department of Archeology concluded that the temples of Shoolpaneshwar and Hampheshwar were important monuments and should be moved to a higher level. Sites were selected for constructing new Shoolpaneshwar and Hampheshwar temples in consultation with temple trustees. Shoolpaneshwar had been relocated and reconstructed near Gora, about 15 km dwonstream from the present location. Hampheshwar was also constructed at higher ground in consultation with the temple trustees and pranpratistha was also planned on 22nd to 24th April, 2000 i.e. before the temple was submerged.

In relation to flora and fauna studies, it was contended by the petitioners that the studies had finished only recently and the action plans were awaited in many cases. In the meanwhile, extensive deforestation of the submergence

zone had taken place, as also part of the area had been submerged, even as the studies have been on. It was also contended that the impact on some of these Wild Ass Sanctuary in Kutch would be very severe.

The guidelines of the Ministry of Environment and Forest required that while seeking environmental clearance for the hydropower projects, surveys should be conducted so that the status of the flora and fauna present could be assessed. A condition of environmental clearance of 1987 as far as it related to flora and fauna was that the Narmada Control Authority would ensure in depth studies on flora and fauna needed for implementation of environmental safeguard measures. It is the case of the respondents that number of studies were carried out and reports submitted. It was observed that the submergence area and catchment area on the right bank of the proposed reservoir exhibited a highly degraded ecosystem which was in contract to the left bank area where there was family good forest cover which formed part of Shoolpaneshwar Wildlife Sanctuary. With regard to the study of fauna, the said report indicated that a well-balanced and viable ecosystem existed in the Shoolpaneshwar Sanctuary. Moreover, with the construction of dam, water availability and soil moisture will increase and support varieties of plants and animals.

It was also contended on behalf of petitioners that the whole project will have serious impacts on health, both around the submergence area and in the command. The preventive aspects had not been given attention. There was no linkage between the studies and work.

On behalf of State of Gujarat, it was contended that large number of studies had been carried out on the health profile of villagers including studies on water related diseases in SSP command area including the area downstream of the dam. The study of M.S. University in 1983 and other studies concluded that the most common diseases in the basin were Malaria, Scabies, Dysentery and Diarrhoea. Of these only a threat to Malaria needed to be of concern. The study concluded that the incidence of hygiene related diseases other than Malaria could be reduced by better water availability. The Gujarat Work Plan covered villages

#### Summary of current situation and progress, Government of Gujarat

Survey of villages in submergence Zone	Complete for all items in the State
Identification of cultural sites	Complete for all items in the State
Collection of data and documentation of sites	Complete
Selection of appropriate sites	Complete
Action Plan	Complete

within 10 Kms radius of the reservoir including resettled population and made provision for the monitoring, surveillance and control of Malaria. The principal features of the Gujarat Work Plan included establishment of a hospital at Kevadia near the dam site, strengthening of laboratory facility including establishment of mobile unit residual insecticidal spraying operations etc. This showed that the area of public health was in no way being neglected.

The petitioner was also critical of the functioning of the Environmental Sub-group as it was contended that the claims of the studies and progress report were accepted at the face value and without verification. It was also contended that the Ministry of Environment and Forests had grossly abdicated its responsibility. This submission was based on the premise that clearance, which had been granted, had lapsed and the Ministry of Environment and Forests did not insist on the Ministry of Water Resources for its renewal and further more the Ministry of Environment and Forests had not taken any cognizance of the criticism about environmental aspects contained in the Morse Committee Report. Lastly the Five Member Group in its first report was critical in many respects and pointed out studies which had remained incomplete but no cognizance was taken by the Ministry of Environment and Forests. The repeated abdication, it was submitted, of the responsibility by the Ministry of Environment and Forests indicated that it was not taking the whole issue with the seriousness it deserved.

On behalf of the State of Gujarat, it was contended that various alleged dangers relating to environment as shown by the petitioners were mostly based on the recommendations of the Morse Committee Report and Five Member Group. While the report of Morse Committee does not require our attention, the same not having been accepted either by the World Bank or the government of India. Para 4.5.2 of the report of Five Member Group which relates to of Morse Committee does not require our attention, the same not having been accepted either by the World Bank or the government of India. Para 4.5.2 of the report of Five Member Group which relates to creation of the Environment Sub-group commends its establishment, its observation about its powers is as follows:-

“4.5.2. It must be noted that the Environmental Sub-group is not a body which merely observes and reports, but watchdog body which can recommend even the stoppage of work if it feels dissatisfied with the progress on the environment front. The recommendations of the Environmental Sub-group will have to be considered by the NCA, and if there was any difference of the opinion at the level, it will have to be referred to the Review Committee, which has the Minister of Water and Environment and Forests as a member. *It seems doubtful whether any more effective mechanism could have been devised or made to work within the framework of our existing political and administrative structures, particularly in the context of a federal system.* Secretary

(Environment & Forests) has, in fact, been given a special position in the NCA inasmuch as he can insist on matters being referred to the Review Committee and at the Review Committee the Minister of Environment and Forests forcefully plead the environmental cause; he can also make environmental point of view heard at the highest level. If in spite of all these arrangements, the environmental point of view fails to be heard adequately, and if project construction tends to take an over-riding precedence, that is a reflection of the relative political importance of these two points of view in our system. This can be remedied only in the long term through persuasion and education, and not immediately through institutional arrangements which run counter to the system.” (Emphasis added).

Apart from the fact that we are not convinced that construction of the dam will result in there being an adverse ecological impact there is no reason to conclude that the Environmental Sub-group is not functioning effectively. The group which is headed by the Secretary, Ministry of Environment and Forests is a high powered body whose work cannot be belittled merely on the basis of conjectures or surmises.

Sh. Shanti Bhushan, learned Senior Counsel while relying upon *A.P. Pollution Control Board Vs. Professor M.V. Mayadu* (1999) 2 SCC 718 submitted that in cases pertaining to environment, the onus of proof is on the person who wants to change the status quo and, therefore, it is for the respondents to satisfy the Court that there will be no environmental degradation.

In *A.P. Pollution Control Board's* case this Court was dealing with the case where an application was submitted by a company to the Pollution Control Board for permission to set up an industry for production of “BSS Castor Oil Derivatives”. Though later on a letter of intent had been received by the said company, the Pollution Control Board did not give its no-objection certificate to the location of the industry at the site proposed by it. The Pollution Control Board, while rejecting the application for consent, inter alia, stated that the unit was a polluting industry which fell under the red category of polluting industry which fell under the red category of polluting industry and it would not be desirable to locate such an industry in the catchment areas of Himayat Sagar, a lake in Andhra Pradesh. The appeal filed by the company against the decision of the Pollution Board was accepted by the appellate authority. A writ petition was filed in the nature of public interest litigation and also by the Gram Panchayat challenging the order of the appellate authority but the same was dismissed by the High Court. On the other hand, the writ petition filed by the company was allowed and the High Court directed the Pollution Board to grant consent subject to such conditions as may be imposed by it.

It is this decision which was the subject-matter of challenge in this Court. After referring to the different concepts in

relation to environmental cases like the 'precautionary principle', this Court relied upon the earlier decision of this Court in *Vellore Citizens' Welfare Forum Vs. Union of India* (1996) 5 SCC 647 and observed that there was a new concept which places the burden of proof on the developer or industrialist who is proposing to alter the status quo and has become part of our environmental law. It was noticed that inadequacies of science had led to the precautionary principle and the said 'precautionary principle' in its turn had led to the special principle of burden of proof in environmental cases where burden of proof in environmental cases where burden as to the absence of injurious effect of the actions proposed is placed on those who want to change the status quo. At page 735, this Court, while relying upon a report of the International Law Commission, observed as follows:

The precautionary principle suggests that where there is an identifiable risk of serious or irreversible harm, including, for example, extinction of species, widespread toxic pollution is major threats to essential ecological processes, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment.

It appears to us that the 'precautionary principle' and the corresponding burden of proof on the person who wants to change the status quo will ordinarily apply in a case of polluting or other project or industry where the extent of damage likely to be inflicted is not known. When there is a state of uncertainty due to lack of data or material about the extent of damage or pollution unlikely to be caused then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution. On the other hand where the effect on ecology or environment of setting up of an industry is known, what has to be seen is that if the environment is likely to suffer, then what mitigative steps can be taken to off set the same. Merely because there will be a change is no reason to presume that there will be ecological disaster. It is when the effect of the project is known then the principle of sustainable development would come into play which will ensure that initiative steps are and can be taken to preserve the ecological balance. Sustainable development can take place which can be sustained by nature/ecology with or without mitigation.

In the present case we are not concerned with the polluting industry which is being established. What is being constructed is a large dam. The dam is neither a nuclear establishment nor a polluting industry. The construction of a dam undoubtedly would result in the change of environment but it will not be correct to presume that the construction of a large dam like the Sardar Sarova will result in ecological disaster. India has an experience of over 40 years in the construction of dams. The experience does not show that construction of a large dam is not cost effective or leads to ecological or environmental degradation. On the contrary there has been ecological

upgradation with the construction of large dams. What is the impact on environment with the construction of a dam is well-known in India and, therefore, the decision in A.P. Pollution Control Board's case (supra) will have no application in the present case.

Reference was made by Sh. Shanti Bhushan to the decision of the United States District Court in the case of *Sierra Club et. V. Robert F. Froehlke* (350 B.F. Supp. 1280(1973). In that case work had begun on Wallisville Project which, inter alia, consisted of a construction of a low dam. It was the case of the plaintiff that the construction of the project would destroy hundreds of thousands of trees and enormous grain, fish and other wild life will lose their habitat and perish. It was contended that the defendants were proceeding in violation of law by not complying with the requirements of National Environmental Policy Act, 1969, (NEPA). Plaintiff, inter alia, sought an injunction for restraining the undertaking of the project in violation of the said Act. The District Court held that notwithstanding the substantial amount of work had already been done in connection with the project but the failure to satisfy full disclosure requirement of NEPA injunction would be issued to halt any further construction until requirements of NEPA had been complied with, that even though there was no Act like NEPA in India at the time when environmental clearance was granted in 1987, nevertheless by virtue of Stockholm Convention and Article 21 of the Constitution the principles of Sierra Club decision should be applied.

In India notification had been issued under Section 3 of the Environmental Act regarding prior environmental clearance in the case of undertaking of projects and setting up of industries including Inter-State River Project. This notification has been made effective from 1994. There was, at the time when the environmental clearance was granted in 1987, no obligation to obtain any statutory clearance. The environmental clearance which was granted in 1987 was essentially administrative in nature, having regard and concern of the environment in the region. Change in environment does not per se violate any right under Article 21 of the Constitution of India especially when ameliorative steps are taken not only to preserve but to improve ecology and environment and in case of displacement, prior relief and rehabilitation measures take place pari passu with the construction of the dam.

At the time when the environmental clearance was granted by the Prime Minister whatever studies were available were taken into consideration. It was known that the construction of the dam would result in submergence and the consequent effect which the reservoir will have on the ecology of the surrounding areas was also known. Various studies relating to environmental impact, some of which have been referred to earlier in this judgement, had been carried out. There are different facets of environment and if in respect of a few of them adequate data was not available it does not mean that the decision taken to grant environmental

clearance was in any way vitiated. The clearance required further studies to be undertaken and we are satisfied that this has been and is being done. Care for environment is an on going process and the system in place would ensure that ameliorative steps are taken to counter the adverse effect, if any, on the environment with the construction of the dam.

Our attention was also drawn to the case of *Tennessee Valley Authority v. Hiram G. Hill* (437 US 153, 57L Ed 2d 117, 98S Ct 2279) where the Tennessee Valley Authority had begun construction of the Tellico Dam and Reservoir project on a stretch of Little Tennessee River. While major portion of the dam had been constructed the Endangered Species Act 1973 was enacted wherein a small fish popularly known as the "Snail darter" was declared an endangered species. Environmental groups brought an action in the United States District Court for restraining impounding of the reservoir on the ground that such an action would violate the Endangered Species Act by causing the snail darter extinction. The District Court refused injunction but the same was granted by the United States Court of Appeal. On further appeal the US Supreme Court held that the Endangered Species Act prohibited the authority for further impounding the river. The said decision has no application in the present case because there is no such act like the Endangered Species Act in India or a declaration similar to the one which was issued by the Secretary of the Interior under that Act. What is, however, more important is that it has not been shown that any endangered species exists in the area of impoundment. In *Tennessee Valley Authority* case it was an accepted position that the continued existence of snail darter which was an endangered species would be completely jeopardized.

Two other decisions were referred to by Sh. Shanti Bhushan - *Arlington Coalition on Transportation v. John A. Volpe* [458 F. 2d 1323 (1972)] and *Environmental Defence Fund, Inc. v. Corps of Engineers of United States Army* [325 F. Supp. 749 (1971)]. In both these decisions it was decided that the NEPA would be applicable even in case of a project which had commenced prior to the coming into force of the said Act but which had not been completed. In such cases there was a requirement to comply with the provisions of NEPA as already noticed earlier. The notification under Section 3 of the Environment Protection Act cannot be regarded as having any retrospective effect. The said notification dated 27th January, 1994, inter alia, provides as follows:

"Now, therefore, in exercise of the powers conferred by sub-section (1) and clause (v) of sub-section (2) of Section (2) of Section 3 of the Environment (Protection) Act, 1986 (29 of 1986) read with clause (d) of sub-rule (3) of the rule 5 of the Environment (Protection) Rules, 1986, the Central Government hereby directs that on and from the date of publication of this notification in the Official Gazette expansion or modernization

of any activity (if pollution load is to exceed the existing one) or a new project listed in Schedule 1 to this notification, shall not be undertaken in any part of India unless it has been accorded environmental clearance by the Central Government in accordance with the procedure hereinafter specified in this notification."

This notification is clearly prospective and inter alia prohibits the undertaking of a new project listed in Schedule 1 without prior environmental clearance of the Central Government in accordance with the procedure now specified. In the present case clearance was given by the Central Government in 1987 and at that time no procedure was prescribed by any statute, rule or regulation. The procedure now provided in 1994 for getting prior clearance cannot apply retrospectively to the project whose construction commenced nearly eight year prior thereto.

### RELIEF AND RAHABILITATION

It is contended by the petitioner that as a result of construction of dam over 41,000 families will be affected in three spread over 245 villages. The number of families have increased from 7000 families assessed by the Tribunal. It was further contended that the submergence area can be broadly divided into two areas, fully tribal area which covers the initial reach of about 100 or so villages which are almost 100% tribal and hilly. These include all the 33 villages of Maharashtra, all 19 of Gujarat and many of the Madhya Pradesh. The second part of the submergence area is the mixed population area on the Nimad plains with a very well developed economy that is well connected to the mainstream. While the tribal areas are stated to be having a rich and diverse resource base and the self sufficient economy, the lack of so-called modern amenities like roads, hospitals and schools are far more a reflection of the neglect and disregard by the Government over the last fifty years than on anything else. Of the 193 villages stated to be affected by Sardar Savorar submergence 140 lie in the Nimad Plains. The population of these villages are a mixture of caste and tribal and these villages have all the facilities like schools, post offices, bus service etc.

It was contended that whereas the project authorities talk only about the families affected by submergence, none of the other families affected by the project are considered as PAFs nor has any rehabilitation package been designed for them. These non-recognised categories for whom no rehabilitation package is given are stated to be those persons living in submergence area who are not farmers but are engaged in other occupation like petty traders, village shopkeepers who are to be affected by submergence; colony affected people whose lands were taken in 1960 to build the project colony, warehouses etc.; canal affected people who would be losing 25 per cent of their holdings because of the construction of the canals; drainage affected people whose lands will be acquired for drainage; 10,000 fishing families living downstream whose

livelihood will be affected; lands of the tribals whose catchment treatment area has been carried out; persons who are going to be affected by the expansion Shoolopaneshwr Sanctuary; persons going to be affected by Narmada Sagar Project and Garudeshwar Weir. It was contended that there was an urgent need to assess comprehensively the totality of the impact and prepare category specific rehabilitation policies for all of them.

It was also submitted that the total number of affected families in all the three States as per the Master Plan prepared by the Narmada Control Authority is 40727. According to the petitioner however, this figure is an underestimate and the estimate of the land required for these PAFs is also on a much lower side. The basis for making this submission is:

- 1) In each village there are many persons left out of the Government list of declared PAFs. These are joint holders (non recognised as landed oustees or PAFs) and the adult sons.
- 2) Incorrect surveys have been conducted and the affected persons have serious apprehensions about the validity of the surveys since at many places the level markings are suspect, in many cases the level markings are suspect, in many cases the people affected at higher levels have been given notices for lower levels, many others at the same levels have been left out and so on. It is also alleged that there have been short-comings in the policies and if they are corrected many more oustees will be entitled to PAFs status. Further more the cut off date for PAFs in Madhya Pradesh including adult son is linked to the date of issuance of notification. Since land acquisition process is still incomplete the number of adult sons entitled to land would increase with the issuance of fresh Section 4 Notification.

From the aforesaid it was contended that the total impact in terms of number of oustees as well as land entitlement will be much larger than what is considered in the Master Plan.

It is also submitted that there was major lacunae in the said policy like the three States having dissimilar policy for R&R. This difference in rehabilitation packages of different States, with the package of Gujarat being more favourable, is leading to a situation where the oustees are forced to shift to Gujarat. The other lacunae which are stated to have many serious problems are alleged to be non provision for fuelwood and grazing land with fodder. No provision for rehabilitation of people involved in non-agricultural occupation. According to the petitioner the number of affected people even by submergence have been underestimated. The policy regime governing them has many serious lacunae. The increase in the numbers is due to lack of proper surveys and planning and the provision of just and due entitlements to the PAFs. Since this process of providing just entitlements is still incomplete, and the

policies need a thorough review, the numbers and entitlements are likely to go up further. Even the magnitude of the task of R&R cannot be assessed properly policies till the above are considered and proper policies introduced.

It is also contended that before embarking on the Sardar Sarovar Project it was necessary that the Master Plan for rehabilitation of the families to be affected is completed. According to the petitioner the Master Plan which was submitted in the Court cannot be regarded as an acceptable Master Plan inasmuch as it has not mention of people affected by Sardar Sarovar project other than those affected by submergence and it has not estimate of resource base of the oustees in their original village. Further the plan makes no estimation of the forest land, grazing land and resources being used by the oustees. The Master Plan persists with the discriminatory and differential policies which are less than just to the oustees. There is also no planning for community resettlement even though the Award of the Narmada Tribunal made detailed provision regarding rehabilitation of the oustees which required that there should be village wise community rehabilitation.

In support of this contention reliance is placed on the following stipulation for rehabilitation contained in the Award of the Narmada Tribunal "That Gujarat shall establish rehabilitation villages in Gujarat in the irrigation command of the SSP on the norms hereinafter mentioned for rehabilitation of the families who are willing to migrate to Gujarat." The submission is that no specific rehabilitation village, as envisaged by the Tribunal's Award, has been established in Gujarat. The issue of community re-settlement is stated to be to merely an issue of community facility but is a more fundamental issue. The issue is really one of preserving social fabric and community relating of the oustees which, it is alleged, is being destroyed due to dispersal of the community who are being resettled at different sites.

Dealing with the situation of those oustees who have been resettled in Gujarat it is submitted by the petitioner that there are large number of grievances of the said oustees in 35 re-settlement sites. With the passage of time the number of problems overall would become much more, is the contention. The petitioner finds fault with the quality of land which has been given in Gujarat to the oustees contending that large number of oustees have been given land outside the command area of irrigation and in some re-settlement sites there is a serious water-logging problem. It is also the case of the petitioner that sufficient land for re-settlement of the oustees from Madhya Pradesh is not available in Gujarat despite the claim of the State of Gujarat to the contrary.

With regard to Maharashtra it is contended by the petitioner that the official figure of the total number of PAFs affected in Maharashtra is not correct and the number is likely to be more than 3113 PAFs estimated by the State of Maharashtra. Further-more adequate land of desired quality has not been made available for resettlement till 90 mar.

And even thereafter. Reference is made to the affidavit of the State of Maharashtra in which it is stated that it proposes to ask for the release of 1500 hectares of forest land for re-settlement and the submission on behalf of the petitioner is that release of such land shall be in violation of Forest Conservation Act, 1980 and is not in public interest for forest cover will be further depleted.

With regard to the State of Madhya Pradesh it is submitted that as per the award the PAFs have a right to choose whether to go to Gujarat or to stay in the home State. The State of Madhya Pradesh is stated to have planned the whole re-settlement based on the assumption that overwhelming proportion of oustees entitled to land will go to Gujarat yet even for the limited number of oustees who are likely to stay in Madhya Pradesh the submission is that no land is available. The petitioner also disputes the averment of the State of Madhya Pradesh that the oustees have been given a choice as to whether they would like to go to Gujarat or stay in the home State. According to the petitioner the majority of the oustees would prefer to stay in the home State that is Madhya Pradesh but sufficient land for their resettlement in Madhya Pradesh is not available. According to the petitioner the State of Madhya Pradesh has stated that it does not have land for any PAFs above 830 and even for 830 PAFs the land is not available. It is also submitted that the Madhya Pradesh Government cannot wriggle out of its responsibility to provide land for the oustees by offering them cash compensation. The petitioner finds fault with the effort of the State of Madhya Pradesh to push the oustees to Gujarat whose rehabilitation scheme is more attractive and beneficial than that of Madhya Pradesh.

The petitioner further contends that one of the fundamental principle laid down is that all the arrangements and resettlement of the oustees should be made one year in advance of submersion. In *B.D. Sharma Vs. Union of India's* case this Court has held that resettlement and rehabilitation has to be done at least six months in advance of submersion, complete in all respects. It is, therefore, contended that since offers to the Madhya Pradesh oustees affected at 90 mtr. to be settled in Madhya Pradesh has not been made, there cannot be any question of further construction till one year after the resettlement of these PAFs at 90 mtr.

The petitioner is also critical of the functioning of the R&R Sub-group and it is contended that the said Sub-group has not taken any cognizance of the various issues and problems enumerated by the petitioner. It is submitted that in assuring that the relief and rehabilitation arrangements are being done the said R&R Sub-group merely accepts the assertions of the Government rather than verifying the claims independently. There is also a complaint regarding the manner in which R&R Committee takes decision on the spot when it makes frequent visits. It is contended that the decisions which are taken in an effort to solve the grievances of the oustees is done in the most insensitive

way. The R&R Sub-group, it is contended is an official agency of the Government itself being a Sub-group of the NCA, which is pushing the project ahead and the question raised by the petitioner is as to how can the same body which is building a project and executing the R&R be also monitoring it.

It is a case of the petitioners that there is a need for independent monitoring agency in the three States who should be asked to monitor the R&R of the oustees and see to the compliance with the NDWT award. No construction should be permitted to be undertaken without clearance from this authority. Lastly it is contended that large number of grievances are persisting even after twenty years and the pace of resettlement has been slow. The petitioner seems to have contended that the relief and rehabilitation can be manageable only if the height of the dam is significantly lessened which will reduce submersion and displacement of people.

In order to consider the challenge to the execution of the project with reference to Relief and Rehabilitation it is essential to see as to what is the extent and the nature of submergence.

The Sardar Sarovar Reservoir level at 455 ft. would affect 193 villages in Madhya Pradesh, 33 villages in Maharashtra and 19 villages in Gujarat. The submergence villages are situated on the banks of river Narmada having gentle to steep slopes of the Satpura hills, A village is considered affected even when the water level touches the farm/hut at lowest level. It may be noted that only 4 villages (3 villages in Gujarat and 1 village in Madhya Pradesh) are getting submerged fully and the rest 241 villages are getting affected partially.

The state-wise land coming under submergence (category-wise) is given below:

The aforesaid table shows that as much as 12869 hectares table shows that as much as 12869 hectares of the affected land is other than agricultural and forest and includes the river bed area.

When compared to other similar major projects, the Sardar Sarovar Project has the least ratio of submergence to the area benefited (1.9% only). The ratio of some of the existing schemes is as much as 25% as can be seen from the table below:

Conferring the assertion that the construction of the dam would result in large scale relocation and uprooting of tribals, the factual position seems to be that the tribals constitute bulk of PAFs in Gujarat and Maharashtra, namely, 97% and 100% respectively. In the case of Madhya Pradesh, the tribals PAFs are only 30% while 70% are non-tribals.

The tribals who are affected are in indigent circumstances and who have been deprived of modern fruits of



Sr. No.	Type of land	STATES			TOTAL
		GUJARAT	MAHARASHTRA	MADHYA PRADESH	
1.	Cultivated land	1877	1519	7883	11279
2.	Forest land	4166	6488	2731	13385
3.	Other land including river bed	1069	1592	10208	12869
	<b>Total land</b>	7112	9599	20822	37533

Sr. No.	Name of Project	State	Benefited Area (in ha)	Submergence Area (in ha)	Irrigation benefit per ha. Submergence	Percentage of area submerged to area irrigated
1.	Hirakud	Orissa	251150	73892	3.40	29.42
2.	Shriram-sagar	Andhra Pradesh	230679	44517	5.24	19.14
3.	Gandhuisagar	Madhya Pradesh	503200	66186	7.60	13.15
4.	Paithan	Maharashtra	278000	35000	7.94	15.29
5.	Tungbhadra	Karnataka	372000	37814	9.84	10.16
6.	Pench	Maharash	94000	7750	12.13	8.24
7.	Nagarjun-sagartra	Andhra Pradesh	895000	28500	31.40	3.18
8.	Bhakra	Himachal Pradesh	676000	16800	40.24	2.48
9.	Sardar Sarovar	Gujarat	1903500	37533	50.71	1.97

development such as tap water, education, road, electricity, convenient medical facilities etc. The majority of the project affected families are involved in rain-fed agricultural activities for their own sustenance. There is partial employment in forestry sector. Since the area is hilly with difficult terrain, they are wholly dependent on vagaries of monsoon and normally only a single crop is raised by them. Out of the PAFs of Madhya Pradesh who have re-settled in Gujarat, more than 70% are tribal families. Majority of the total tribal PAFs are stated to have already been re-settled in Gujarat after having exercised their option. It is the contention of the State of Gujarat that the tribals in large number have responded positively to the re-settlement package offered by that state.

In Madhya Pradesh, the agricultural lands of the tribal villages are affected on an average to the extent of 28% whereas in the upper reaches i.e. Nimad where the agriculture is advanced, the extent of submergence, on an average, is only 8.5%. The surveys conducted by HMS Gour University (Sagar) the Monitoring and Evaluation Agency, set up by Government of Madhya Pradesh, reveals that the major resistance to relocation is from the richer, non-tribal families of Nimad who fear shortage of agricultural labour if the landless labourers from the areas accept re-settlement.

The displacement of the people due to major river valley projects has occurred in both developed and developing countries. Into the past, there was no definite policy for rehabilitation of displaced persons associated with the river valley projects in India. There were certain project specific programmes for implementation on temporary basis. For the land acquired, compensation under the provisions of Land Acquisition Act, 1894 used to be given to the project affected families. This payment in cash did not result in satisfactory resettlement of the displaced families. Realizing the difficulties of displaced persons, the requirement of relief and rehabilitation of PAFs in the case of Sardar Sarovar Project was considered by the Narmada Waters Disputes Tribunal and the decision and final order of the Tribunal given in 1979 contains detailed directions in regard to acquisition of land and properties, provision for land, house plots and civic amenities for the re-settlement and rehabilitation of the affected families. The re-settlement policy has thus emerged and developed along with Sardar Sarovar Project.

The Award provides that every displaced family, whose more than 25% of agricultural land holding is acquired, shall be entitled to and be allotted irrigable land of its choice to the extent of land acquired subject to the prescribed ceiling of the State concerned with a minimum of two

hectares land. Apart from this land based rehabilitation policy, the Award further provides that each project affected persons will be allotted a house plot free of cost and re-settlement and rehabilitation grant. The civic amenities required by the Award to be provided places of re-settlement include one primary school for every 100 families, one Panchayat Ghar, one dispensary, one seed store, one children's pai, one village pond and one religious place of worship for every 500 families, one drinking water well with trough and one tree platform for every 50 families approach road linking each colony to main road; electrification; water supply, sanitary arrangement etc. The State governments have liberalised the policies with regard to re-settlement and offered packages more than what was provided for in the Award e.g. the Governments of Madhya Pradesh, Maharashtra and Gujarat have extended the R&R benefits through their liberalised policies even to the encroaches, landless/displaced persons, joint holders, Tapu land (Island) holders and major sons (18 years old) of all categories of affected persons. The Government of Maharashtra has decided to allot one hectare of agricultural land free of cost even to unmarried major daughters of all categories of PAFs.

In the environmental clearance granted by the Ministry of Environment and Forests vide its letter dated 24th June, 1987, one of the conditions stipulated therein was for information from the project authorities on various action plans including Rehabilitation Master Plan of 1989.

It is the contention of the petitioners that the failure to prepare a "Master Plan" constitutes non-compliance with the requirement of the Tribunal's Award as well as environmental clearance. The Tribunal's Award does not use the expression 'Master Plan' but as per clause XI Sub-clause IV(2) (iii), what is required, is as under:

"The three States by mutual consultation shall determine within two years of the decision of the Tribunal, the number and general location of rehabilitation villages required to be established by Gujarat in its own territory."

It is with regard to this clause in the Award that, presumably, the aforesaid letter of 24th June, 1987 granting environmental clearance required the preparation of the new Master Plan.

In 1988 when the project was first cleared by the Planning Commission from investment angle, it was estimated that 12180 families would be affected in three States. Based on these numbers, the State Governments independently prepared their action plans and announced their R&R policy based on Tribunal's Award. On the basis of the said action plans the Narmada Control Authority submitted Rehabilitation Master Plan to the Ministry of Environment and forests along with its letter dated 3/4.5.1989. Out of the total population, which is affected by the submergence, large number are tribals and hence attention was paid by the State Governments to liberalise their policies for

protecting the socio-economic and cultural milieu and to extend the R&R benefits even to other categories of persons who were not covered by the Tribunal's Award. This led to the liberalization of the R&R packages by the three States which packages have been referred to hereinabove. As a result of the liberalization of the packages, the number of PAFs as estimated in 1992 by the estate Governments were 30144. Based on the material available, the three State Governments prepared individual action plans in 1993 but those action plans were intergraded by the Narmada Control Authority first in 1993 and again in 1995 as an integrated Master Plan to present a holistic picture of the R&R programme. The Master Plan deals with socio-economic and cultural milieu and procedures, implementation machinery, organisation for R&R, monitoring and evaluation, empowerment of women and youth, special care for vulnerable groups, financial plans for R&R etc. As per the 1990 Master Plan the total PAFs have increased to 40227 from 30144 due to addition of 100 more genuine PAFs in Maharashtra. This Master Plan and their preference in R&R to settle in home State or in Gujarat.

The reason for increase in number of PAFs has been explained in the Master Plan and the reasons given, inter alia, are:

- (a) After CWC prepared backwater level data, the number of PAFs in Madhya Pradesh (MP) increased by 12000 PAFs as their houses are affected in a 1 in 100 years flood.
- (b) Government of Gujarat (GOG) included major sons of the dyke villages as PAFs.
- (c) Cut off date for major sons was extended by GOG and Government Maharashtra (GOM).
- (d) PAFs affected in MP, have increased due to delay in publication of Section 4 notification under the Land Acquisition Act.
- (e) Persons socially or physically cut off due to impounding of water in reservoir, are also considered as PAFs by all the three States.
- (f) All the three States decided to consider encroachers as PAFs.
- (g) Major unmarried daughters in Maharashtra are considered as a separate family by Government of Maharashtra.
- (h) Some genuine PAFs were earlier left out (as many stayed in remote areas or used to undertake seasonal migration to towns and developed areas in search of casual work).

As far as the State of Gujarat is concerned, its contention is that the task of R&R is not impossible as recognised by the FMG-I in its 1994 report and according to the estate, it is fully ready and prepared to re-settle in Gujarat all the PAFs upto FRL 455 ft.

On 13th November, 1996, a meeting of the Review

Committee of the Narmada Control Authority chaired by the Union Minister of Water Resources was held. This meeting was attended by the Chief Ministers of all the States including Rajasthan and representatives of Ministry of Environment and Forests, Ministry of Social Justice and Empowerment, Government of India. In the meeting it was unanimously decided that the reviews of the implementation of re-settlement and rehabilitation measures will be undertaken for every five meter height of the dam jointly by the concerned R&R Sub-group and Environmental Sub-group so that work could progress *pari passu* with the implementation measures. In its meeting held on 6th January, 1999, R&R Sub-Group of Narmada Control Authority observed that arrangements made by the States for R&R of the balance families pertaining to the dam height EL90 meter were adequate and a meeting of the party States should be convened shortly to finalise the action plan. Pursuant thereto a special Inter-State Meeting was convened under the chairmanship of the Secretary to the Government of India, Ministry of Social Justice and Empowerment on 21st January, 1999 at New Delhi and action plan for re-settlement and rehabilitation for balanced families of dam height EL 90 meter was finalised for implementation by the States. It is the case of the State of Gujarat that it had issued notices and made offers in January, 1998 to PAFs affected at RL 90 meter in connection with the selection of land and their re-settlement in Gujarat. According to it, even in respect of PAFs affected at RL 95 meter, notices were issued in January, 1999 and to the PAFs included in the subsequent list, notices were issued in September 1999. The process of land selection by PAFs who had opted to resettle in Gujarat at RL 95 meter was already started. According to the Union of India, the Master Plan was under implementation and the progress of R&R at various elevations of dam viz. EL 90 meter, EL 95 meter, EL 110 meter and FRL 138.68 meter has been made.

The measures which have been implemented for sustainable development with regard to preserving the socio-cultural environment of the displaced persons in the States of Maharashtra, Gujarat and Madhya Pradesh are stated to be as follows:

- Three choices to the people for the selection of relocation sites.
- Integration of the displaced person with the neighboring villages by organising medical check-up camps, animal husbandry camps, festivals, eye camps, rural development seminar for village workers etc.
- Establishment of rehabilitation committees at different levels.
- Respect of traditional beliefs, rituals and right at the starting of house construction, the day and time of leaving the old house and village and the day and time of occupying the new house etc.
- The sacred places at the native villages are being recreated along with their settlements at new sites.

- Installation of all the religious deities with the due consultation of religious heads.
- Promotion of cultural milieu viz. Social festivals, religious rights, rights of passage, presence of priests, shaman, kinsmen, clansmen etc.
- Special consideration for the preservation of holistic nature of the culture.
- Proper use of built-in-mechanism of cultural heritage of the displaced persons.
- Launching of culturally appropriate development plan.
- Genuine representation of the traditional leader.”

The Tribunal had already made provision of various civic amenities which were further liberalized by the State Governments during implementation. The existing development programmes were strengthened for ensuing sustainable development at the rehabilitation sites. These were Integrated Rural Development Programme (IRDP) for agriculture, business and village industries; Integrated Child Development Scheme (ICDS) for nutrition, health and education; Jawahar Rojgar Yojna (JRY); aids for improved seeds, fertilizers, irrigation, animal husbandry; Training Rural Youth for self-employment (RTYSEM); Employment Guarantee Scheme (EGS), Social Assistance; Industrial Training Institute (ITI); Tribal Development Programme (TDP), financial benefits to the backward classes, economically weaker sections, tribals and other backward classes (OBC), eye camps, subsidies to farmers (seed, tractorisation, fertilizers, diesel, etc.)

Other benefits which were extended for improving the quality of life of the re-settled PAFs included fodder farm, mobile sale, shop of fodder, seeds cultivation training, initial help in land preparation for agricultural activities, better seeds and fertilizers, access to finance, special programme for women in the traditional skills entrepreneurship development, employment skill formation, different plantation programmes, special emphasis for pasture management, environment awareness and education programme, programmes for bio-gas/smokeless chulhas, safe drinking water supply, electricity, lift irrigation, fertilizers kit distribution, gypsum treatment of soil etc.

The project authorities in these three States of Madhya Pradesh, Gujarat and Maharashtra represented that comprehensive health care was available in tribal areas where the displaced families had been re-settled. It was contended that extensive preventive health measures like mass immunization, anti-malaria programme, family welfare programmes, child development schemes etc. had been undertaken. What is important is that primary health centers were established at relocation sites for all necessary health facilities to the PAFs.

The submission on behalf of Union of India was that there was a well-established mechanism of Government of India for coordination and monitoring of Re-settlement &

Rehabilitation (R&R) programmes in case of Sardar Sarovar Project. The R&R Sub-group and Rehabilitation Committee of Narmada Control Authority are responsible for applying its independent mind on R&R. The Sub-group convenes its meeting regularly to monitor and review the progress of R&R while Rehabilitation Committee visits the submergence areas/relocation sites to see whether the rehabilitation is taking place physically and to hear the individual problems of the PAFs. The R&R Group, keeping in view the progress of relief and rehabilitation, has not permitted the height to be raised, until and unless it is satisfied that adequate satisfactory progress has been made with regard to R&R. Whereas at an earlier point of time in 1994, the construction schedule had required the minimum block level to be raised to 85 meters, the R&R Sub-group had permitted the same to be raised to EL 69 meter only during that period of match the R&R activity. It was the meeting of R&R Sub-group on 6th January, 1999 after the R&R Sub-group had reviewed the progress and had satisfied itself that the land for re-settlement in Gujarat, Maharashtra and Madhya Pradesh, which were available, was more than required for the re-settlement of the balanced PAFs that it cleared the construction upto the dame height EL 90 Meters. The action plan for the same had been approved and is under implementation by the States concerned.

The petitioners had contended that no proper surveys were carried out to determine the different categories of affected persons as the total number of affected persons had been shown at a much lower side and that many had been denied PAF status. From what is being stated hereinabove, it is clear that each State has drawn detailed action plan and it is after requisite study had been made that the number of PAFs have been identified. The number has substantially increased from what was estimated in the Tribunal's Award. The reason for the same, as already noticed, is the liberalisation of the R&R packages by the State Governments. Except for a bald assertion, there appears to be no material on which this Court can come to the conclusion that no proper surveys had been carried out for determining the number of PAFs who would be adversely affected by the construction of the dam.

Re-settlement and rehabilitation packages in the three States were different due to different geographical, local and economic conditions and availability of land in the States. The liberal packages available to the Sardar Sarovar Project oustees in Gujarat are not even available to the project affected people of other projects in Gujarat. It is incorrect to say that the difference in R&R packages, the package of Gujarat being the most liberal, amounts to restricting the choice of the oustees. Each State has its own package and the oustees have an option to select the one which was most attractive to them. A project affected family may, for instance, chose to leave its home State of Madhya Pradesh in order to avail the benefits of more generous package of the State of Gujarat while other PAFs similarly situated may opt to remain at home and take advantage of the less liberal package of the State of Madhya Pradesh.

There is no requirement that the liberalisation of the packages by three States should be to the same extent and at the time, the States cannot be faulted if the package which is offered, though not identical with each other, is more liberal than the one envisaged in the Tribunal's Award.

Dealing with the contention of the petitioners that there were large number of persons who were living in the submergence area and were not farmers and would lose their livelihood due to loss of the community and/or loss of the river and were not being properly rehabilitated, Mr. Harish Salve, learned Senior Counsel contended that this averment was not true. According to him, all the families in the 105 hilly tribal villages were agriculturists, cultivating either their own land or Government land and all of whom would be eligible for alternative agricultural land in Gujarat. Only a small number of non-agriculturists, mainly petty shopkeepers were found in these villages of tribal areas. In Gujarat there were 20 such non-agriculturists families out of a total of 4600 affected families and all of these had been re-settled as per their choice so that they could restart their business. In Maharashtra out of 3213 affected families, not a single family was stated to fall under this category. Amongst the affected families of Madhya Pradesh, the figure of such non-agriculturist family was also stated to be not more than couple of 100. In our opinion it is neither possible nor necessary to decide regarding the number of people likely to be so affected because all those who are entitled to be rehabilitated as per the Award will be provided with benefits of the package offered and chosen.

With regard to the colony affected people whose 1380 acres of land was acquired in six villages for the construction of a colony, most of the landholders had continued to stay in their original houses and about 381 persons were stated to have been provided permanent employment in the project works. At the time, the land was acquired in 1962-63, compensation was paid and in addition thereto, the Government of Gujarat devised a special package in August, 1992 providing ex-gratia payment upto Rs. 36000.00 to the land losers for purchase of productive assets or land for those who had not received employment in the project.

Dealing with the contention of the petitioners that there will be 23500 canal affected families and they should be treated at par to that of oustees in the submergence area, the respondents have broadly submitted that there is a basic difference in the impacts of the projects in the upstream submergence area and its impacts in the beneficiary zone of the command area. While people, who were oustees from the submergence zone, require re-settlement and rehabilitation, on the other hand, most of the people falling under the command area were in fact beneficiaries of the projects and their remaining land would now get relocated with the construction of the canal leading to greater agricultural output. We agree with this view and that is why, in the Award of the Tribunal, the State of Gujarat was not required to give to the canal affected people the

same relief which was required to be given to the oustees of the submergence area.

Dealing with the contention of the petitioners that the oustees were not offered a chance to re-settle in Gujarat as a community and that there was a clear requirement of village-wise communication rehabilitation which had not been complied with, the contention of the respondents was that no provision of Tribunal's Award had been shown which caused any such obligation on the Government of Gujarat. What the Award of the Tribunal required is resettlement of the PAFs in Gujarat at places where civic amenities like dispensary, schools, as already been referred to hereinabove, are available.

Subsequent to the Tribunal's Award, on the recommendation of the World Bank, the Government of Gujarat adopted the Principle of re-settlement that the oustees shall be relocated as village units, village sections or families in accordance with the oustees preference. The oustees' process. The requirement in the Tribunal's Award was that the Gujarat shall establish rehabilitation villages in Gujarat in the irrigation command of the Sardar Sarovar Project on the norms mentioned for rehabilitation of the families who were willing to migrate to Gujarat. This provision could not be interpreted to mean that the oustees families should be resettled as a homogeneous group in a village exclusively set up for each such group. The concept of community wise re-settlement, therefore, cannot derive support from the above quoted stipulation. Besides, the norms referred to in the stipulation relate to provisions for civic amenities. They vary as regards each civic amenity vis-a-vis the number of oustees families. Thus, one panchayat ghar, one dispensary, one childrens' park, one seed store and one village pond is the norm for 500 families, one primary school (3 rooms) for 100 families and a drinking water well with trough and one platform for every 50 families. The number of families to which the civic amenities were to be provided was thus not uniform and it was not possible to derive therefrom a standardised pattern for the establishment of a site which had nexus with the number of oustees' families of a particular community or group to be resettled. These were not indicators envisaging re-settlement of the oustees families on the basis of tribes, sub-tribes, groups or sub-groups.

While re-settlement as a group in accordance with the oustees preference was an important principle/objective, the other objectives were that the oustees should have improved or regained the standard of living that they were enjoying prior to their displacement and they should have been fully integrated in the community in which they were re-settled. These objectives were easily achievable if they were re-settled in the command area where the land was where large chunks of land were readily available. This was what the Tribunal's Award stipulated and one objective could don't be seen in isolation of the other objectives.

The Master Plan, 1995 of Narmada Control Authority also pointed out that "the Bhils, who are individualistic people building their houses away from one another, are getting socialized; they are learning to live together". Looking to the preferences of the affected people to live as a community, the Government of Gujarat had basically relied on the affected families' decision as to where they would like to relocate, instead of forcing them to relocate as per a fixed plan.

The underlined principle in forming the R&R policy was not merely of providing land for PAFs but there was a conscious effort to improve the living conditions of the PAFs and to bring them into the mainstream. If one compares the living conditions of the PAFs and to bring them into the mainstream. If one compares the living conditions of the PAFs in their submerging villages with the rehabilitation packages first provided by the Tribunal's Award and then liberalised by the States, it is obvious that the PAFs had gained substantially after their re-settlement. It is for this reason that in the Action Plan of 1993 of the Government of Madhya Pradesh it was stated before this Court that "therefore, the re-settlement and rehabilitation of people whose habitat and environment makes living difficult does not pose any problems and so the rehabilitation and re-settlement does not pose a threat to environment". In the affidavit of Dr. Asha Singh, Additional Director (Socio & CP), NVDA, as produced by the Government of Madhya Pradesh in respect of visit to R&R sites in Gujarat during 21st to 23rd February, 2000 for ascertaining the status relating to grievances and problems of Madhya Pradesh PAFs resettled in Gujarat, it was, inter alia, mentioned that "the PAFs had informed that the land allotted to them is of good quality and they take the crops of Cotton, Jowar and Tuwar. They also stated that their status has improved from the time they had come to Gujarat but they want that water should start flowing in the canals as soon as possible and in that case they will be able to take three crops in one year as their land is in the command area." Where the conditions in the hamlets, where the tribals lived, were not good enough the rehabilitation package ensured more basic facilities and civic amenities to the re-settled oustees. Their children would have schools and children's park, primary health centre would take care of their health and, of course, they would have electricity which was not a common feature in the tribal villages.

Dealing with the contention of the petitioners that there was no provision for grazing land and fuel wood for the PAFs, it is rightly contended by the State of Gujarat that grazing land was not mandated or provided for in the Tribunal's Award but nevertheless, the grazing land of six villages was available for use PAFs. It may be that the grazing land was inadequate but this problem will be faced by the entire State of Gujarat and not making such land available for them does not in any way violate any of the provisions of the Award.

With regard to providing irrigation facilities, most of the re-settlement of the project affected families were provided irrigation facilities in the Sardar Sarovar Project command area or in the command areas of other irrigation project. In many of the out of command sites, irrigated lands were purchased. In cases where the irrigation facilities were not functioning, the Government of Gujarat had undertaken the work of digging tubewells in order to avoid any difficulty with regard to irrigation in respect of those oustees who did not have adequate irrigation facilities. It was contended that because of the delay in the construction of the project, the cut off date of 1st January, 1987 for extending R&R facilities to major sons were not provided. The Tribunal's Award had provided for land for major sons as on 16.8.1978. The Government of Gujarat, however, extended this benefit and offered rehabilitation package by fixing the cut off date of 1.1.1987 for granting benefits to major sons. According to the Tribunal's Award, the sons who had become major one year prior to the issuance of the Notification for land acquisition were entitled to be allotted land. The Land Acquisition Notification had been issued in 1981-82 and as per the Award, it was only those sons who had become major one year prior to that date who would have become eligible for allotment of land. But in order to benefit those major sons who had attained majority later, the Government of Gujarat made a relaxation so as to cover all those who became major upto 1.1.1987. The Government of Gujarat was under no obligation to do this and would have been quite within its right merely to comply with the provisions of the Tribunal's Award. This being so, relaxation of cut off date so as to give extra benefit to those sons who attained age of majority at a later date, cannot be faulted or criticized.

Dealing with the contention of the petitioners that there is a need for a review of the project and that an independent agency should monitor the R&R of the oustees and that no construction should be permitted to be undertaken without the clearance of such an authority, the respondents are right in submitting that there is no warrant for such a contention. The Tribunal's Award is final and binding on the States. The machinery of Narmada Control Authority has been envisaged and constituted under the Award itself. It is not possible to accept that Narmada Control Authority is not to be regarded as an independent authority. Of course some of the members are Government officials but apart from the Union of India, the other States are also represented in this Authority. The project is being undertaken by the Government and it is for the Governmental authorities to execute the same. With the establishment of the R&R Sub-group and constitution of the Grievances Redressal Authorities by the States of Gujarat, Maharashtra and Madhya Pradesh, there is a system in force which will ensure satisfactory re-settlement and rehabilitation of the oustees. There is no basis for contending that some outside agency or National Human Rights Commission should see to the compliance of the Tribunal Award.

## MONITORING OF REHABILITATION PROGRAMME

The Ministry of Water Resources, Government of India is the Nodal Ministry for the Sardar Sarovar Project and other Union Ministries involved are the Ministries of Environment and Forests and Social Justice and Empowerment. As a consequence of the Tribunal's Award, Narmada Control Authority was created to co-ordinate and oversee the overall work of the project and to monitor the R&R activities including environmental safeguard measures. The Review Committee of the Narmada Control Authority consists of the Union Minister of Water Resources as its Chairman, the Union Ministry of Environment and Forests and the Chief Ministers of Gujarat, Madhya Pradesh, Maharashtra and Rajasthan as Members. This Review Committee may sue *moto* or on the application of any party State or the Secretary, Ministry of Environment and Forests review and decision of the Narmada Control Authority. In the Narmada Control Authority, Re-settlement & Rehabilitation (R&R) Sub-group has been created for closely monitoring the R&R progress. This Sub-group is headed by the Secretary, Government of India, Ministry of Social Justice & Empowerment and is represented by Members/Invitees of participating States, academic institutions having expertise in R&R, independent socio-anthropological experts and non-Governmental Organization. The functions of this Sub-group are as follows:-

1. To monitor the progress of land acquisition in respect of submergence land of Sardar Sarovar Project and India (Narmada) Sagar Project (ISP)
2. To monitor the progress of implementation of the action plan of rehabilitation of project affected families in the affected villages of SSP and ISP in concerned states.
3. To review the R&R action from time to time in the light of results of the implementation.
4. To review the reports of the agencies entrusted by each of the State in respect of monitoring and evaluation of the progress in the matter of re-settlement and rehabilitation.
5. To monitor and review implementation of re-settlement and rehabilitation programmes *pari passu* with the raising of the dam height, keeping in view the clearance granted to ISP and SSP from environmental angle by the Government of India and the Ministry of Environment and Forests.
6. To coordinate states/agencies involved in the R&R programmes of SSP and ISP.
7. To undertake any or all activities in the matter of re-settlement and rehabilitation pertaining to SSP and ISP.

## REHABILITATION COMMITTEE

This Court vide order dated 9.8.1991 in *B.D. Sharma Vs. Union of India and Others* 1992 Supply. (3) SCC 93

directed the formation of a Committee under the chairmanship of the Secretary, Ministry of Social Justice & Empowerment, Government of India to visit the submergence areas/re-settlement sites and furnish the report of development and progress made in the matter of rehabilitation. The Rehabilitation Committee headed by the Secretary, Government of India, Ministry of Social Justice and Empowerment and having representatives of the three States Governments as its members had been constituted. It is the case of the Union of India that this Committee visited regularly the various R&R sites and submergence villages in the three States and submitted reports to this Court from time to time. By order dated 24th October, 1994 this Court in the aforesaid case of B.D. Sharma (*supra*) observed that all the directions issued by the Court from time to time have been complied with and nothing more be done in the petition and the petition was disposed off. Most of the recommendations/observations as made by this Committee are stated to have been complied fairly by the States concerned.

In addition to the above, the officials of the Narmada Control Authority are also stated to be monitoring the progress of R&R regularly by making field visits. The individual complaints of the PAFs are attended and brought to the notice of the respective Governments.

#### GRIEVANCES REDRESSAL MECHANISM

The appeal mechanism has been established in the policy statements by all the three State Governments for the redressal of grievances of the PAFs. According to this mechanism, if a displaced person is aggrieved by the decision of the Rehabilitation Officers in respect of any R&R process, he may appeal to the concerned agency/officers.

Vide Resolution dated February 17, 1999, the Government of Gujarat set up a high-level authority called "Grievance Redressal Authority (GRA)" before whom the oustees already re-settled and to be re-settled in Gujarat could ventilate their grievances for redressal after their re-settlement till the process of re-settlement and rehabilitation is fully completed. The said Grievances Redressal Authority has Mr. Justice P.D. Desai, retired Chief Justice as its Chairman. This machinery had been established to:

- A) create an Authority before whom oustees who have re-settled in the State of Gujarat can ventilate their grievances relating to the R&R measures taken by the state of Gujarat;
- B) ensure that the oustees already settled and the oustees settled hereinafter in the R&R sites created for re-settlement and rehabilitation of the oustees from the States of Madhya Pradesh and Maharashtra receive all the benefits and amenities in accordance with the Award and the various Government resolutions made from time to time;

- C) ensure that Gujarat oustees re-settled in Gujarat have received all the benefits and amenities dues to them.

The Gujarat Rehabilitation Authority has installed a permanent in-house Grievances Redressal Cell (GRC) within Sardar Sarovar Punarvasavat Agency. The Grievances of the PAFs and the Grievances Redressal Cell deals with the grievances of the PAFs and the grievances redressal is undertaken by it in the following three ways.

- i) Grievances Redressal Cell deals grievances in the regular course on the basis of applications i.e. by holding enquiries and implementing decisions taken pursuant thereto.
- ii) Grievances redressal on the spot through mechanism of Tatkal Friyad Nivaran Samiti.
- iii) Grievances redressal under the mechanism of Single Window Clearance System.

Grievances Redressal Authority has surveyed sites in which PAFs have been re-settled and has submitted reports to this Court from time to time which disclose substantial compliance with the terms of the Award and the rehabilitation package.

In its fourth Report dated 15.11.1999, the Grievances Redressal Authority has surveyed sites in which PAFs have been re-settled and has submitted reports to this Court from time to time which disclose substantial compliance with the terms of the Award and the rehabilitation package.

In its Fourth Report dated 15.11.199, the Grievances Redressal Authority observed "pursuant to the grievance redressal measures taken by GRC, whose approach is positive and grievance redressal oriented, a considerable number of grievances have been resolved by extensive land improvement work done on agricultural land at different sites within a period of six months i.e. April-September, 1999".

The R&R Sub-group in its 20th field visit of the R&R sites in Gujarat on 12/13.1.2000 has noted as follows:

"The Committee after the visit and from interaction with the PAFs, concluded that there is vast improvement in the conditions of PAFs at these R&R sites as compared to the grievances reported for the same sites during previous visits by the Committee/NCA officers. Assessing the perception of PAFs the Committee observed that the majority of PAFs are happy and joining mainstream of country's development".

The Grievances Redressal Cell has dealt with and decided a total of over 6500 grievances.

At the instance of Grievances Redressal Authority, an Agricultural Cell is set up in Sardar Sarovar Punarvasavat Agency with effect from 1st July, 1999. This was done

with an objective of enhancing the productivity of agricultural land allotted to PAFs by adopting of suitable farm management practices and in assisting in resolving land related grievances. Similarly, w.e.f. 1.5.1999, Medical Cells have been set up in Sardar Sarovar Punrvasavat Agency for ensuring effective functioning of medical infrastructure and providing organised system of supervising and monitoring and also for conducting health survey-cum-medical check up activities. The Grievance Redressal Authority has become an effective monitoring and implementing agency with regard to relief and rehabilitation of the PAFs in Gujarat. Apart from resolving independent grievances of PAFs and enforcing the compliance of the provisions of the Award through its exhaustive machinery and mechanism, it is also trying to guide in respect of various other issues not covered by the provisions of the Award such as

- (i) Vocational training of the oustees;
- (ii) Review of Narmada oustees employment opportunity rules;
- (iii) Issue relating to Kevadia Colony;
- (iv) Issue relating to tapu land;
- (v) Development of Kevadia as a tourist centre etc.

In Maharashtra, a local committee was constituted comprising of Additional Collector (SS), Divisional Forest Officer, Re-settlement Officer and two representatives of the oustees nominated by the local Panchayat Samities from among the elected members of the village panchayats in the project affected villages/taluka. This Committee is required to examine the claims of the PAFs and give directions within a time frame and an appeal from its decision lies to the Commissioner. In addition thereto, vide notification dated 17th April, 2000 the Government of Maharashtra has set up a Grievances Redressal Authority in lines established by the State of Gujarat and Mr. Justice S.P. Kurdukar, retired Judge of this Court, has been appointed as its Chairman. This Authority is expected to be analogous to the Grievances Redressal Authority of Gujarat.

In Madhya Pradesh, the grievances of the PAFs have first to be made by a claim which will be verified by the patwari and then scrutinized by the Tehsildar. PAFs may file an appeal against the decision of R&R official before the District Collector who is required to dispose off the same within a period of three months. In the case of Madhya Pradesh also by Notification dated 30th March, 2000 the Government of Madhya Pradesh has constituted a Grievances Redressal Authority similar to the one in Gujarat with Mr. Justice Sohni, retired Chief Justice of Patna High Court as its Chairman.

#### **INDEPENDENT MONITORING & EVALUATION AGENCIES**

The Monitoring and Evaluation of the rehabilitation programme is also being carried out by the independent socio-anthropological agencies appointed by the State

Governments of Maharashtra, Madhya Pradesh and Gujarat as well as Narmada Control Authority. The agencies, which are professional and academic institutes, conduct surveys and in-depth studies relating to PAFs in the submergence and rehabilitation villages. The main object of the monitoring is oriented towards enabling the management to assess the progress, identify the difficulties, ascertaining problem areas, provide early warning and thus call for corrections needed immediately.

The Centre for Social Studies, Surat is the monitoring agency for the Government of Gujarat. This Institute has prepared 24 six monthly progress reports in relation to the re-settlement of PAFs of submergence villages of Gujarat. Similarly for the project affected families of Madhya Pradesh/Maharashtra who have re-settled in Gujarat, the Government of Gujarat has appointed the Gujarat Institute of Development Research, Ahmedabad as the independent Monitoring and Evaluation Agency for monitoring R&R programmes.

In Madhya Pradesh the monitoring and evaluation has been carried out by Dr. H.S. Gaur University, Sagar and the same has been dis-engaged now and a new agency is being appointed. The findings of Dr. H.S. Guar University, Sagar indicated that displaced families in Madhya Pradesh are, by and late, happy with the new agency is being appointed. The findings of Dr. H.S. Guar University, Sagar indicated that displaced families in Madhya Pradesh are, by and large, happy with the new re-settlement in Gujarat and one of the main reason behind their happiness was that the shifting from hamlets had changed their socio-economic status.

In Maharashtra the monitoring and evaluation was earlier being done by the Tata Institute of Social Sciences, Mumbai. This agency had reported that overall literacy rate among project affected persons above six years of age is about 97%, while illiteracy in submergence villages was rampant. Further more the report showed that in the submergence villages, the tribals mostly relied on traditional healers for their ailments. Now the current scenario is that at R&R sites, health centres and sub-centres have been established.

It is thus seen that there is in place an elaborate network of authorities which have to see to the execution and implementation of the project in terms of the Award. All aspects of the project are supervised and there is a Review Committee which can review any decision of the Narmada Control Authority and each of the three rehabilitating States have set up an independent Grievances Redressal Authority to take care that the relief and rehabilitation measures are properly implemented and the grievances, if any, of the oustees are redressed.

On 9th May, 2000, this Court directed State Governments of Gujarat, Madhya Pradesh and Maharashtra to file affidavits disclosing the latest status likely to be affected by raising the height of the dam.



Pursuant to the said direction affidavits on behalf of the three State have been filed and, in response thereto, the petitioners have also filed and affidavit.

On behalf of the State of Gujarat the affidavit of Sh. V.K. Babbar, Commissioner (Rehabilitation) and Chief Executive Officer, Sardar Sarovar Punavasvat Agency (SSPA) has been filed, according to which at FRL 138.68M. the status with regard to PAFs to be re-settled is stated to be as follows:

State	Total Number of PAFs resettled/allotted agricultural land in Gujarat	Balance PAFs to be resettled in Gujarat
Gujarat	4575	25
Maharashtra	710	290
Madhya Pradesh	3280	100450
<b>Total</b>	<b>8565</b>	<b>10765</b>

It is the case of State of Gujarat that 8565 PAFs have been accommodated in 182 R&R sites fully equipped with the requisite civic amenities as provided by the Tribunal's award. The agricultural land allotted to these PAFs is 16973 hectares.

Dealing specifically with the status of PAFs at RL 90 mtr., 95 mtr. and 110 mtr. it is averred in the said affidavit that all the PAFs of Gujarat at RL 90 mtr. have been re-settled and the balance PAFs of Madhya Pradesh and Maharashtra affected at RL 90 mtr. have already been offered R&R package in Gujarat. The process of re-settlement is continuing and reliance is placed on the observation of the GRA which as stated in its Fourth Report dated 15th November, 1999 that "There is substantial Compliance of the Re-settlement and Rehabilitation measures as mandated by the Final Report of NWDT, including provision of civic amenities, and also of all the inter-linked provisions of the Government of Gujarat and that, therefore, PAFs from the States of Madhya Pradesh and Maharashtra affected upto the height of RL 90 mtr. can be accommodated as per their choice at these selected 35 sites in Gujarat."

With respect to the PAFs affected at RL 95 mtr. the affidavit states that the PAFs of Gujarat have already been settled and while the affected PAFs of Madhya Pradesh and Maharashtra have been offered R&R package in Gujarat in January 1999, September 1999 and January, 2000. The RL 95 mtr. Action Plan for these PAFs has also been prepared by the Government of Gujarat in Consultation with the Governments of Gujarat in consultation with the Governments of Madhya Pradesh and Maharashtra and has been sent to the NCA. The case of the State of Gujarat, therefore, is that all the PAFs wanting to be re-settled in

Gujarat have been offered the package but consent of all the PAFs has not so far been received but the Government of Gujarat has sufficient land readily available which can be allotted to the said PAFs as soon as they come and select the same.

With regard to the status of PAFs at RL 110 mtr. all the PAFs (2642 of Madhya Pradesh and 119 of Maharashtra) remain to be re-settled in Gujarat and R&R package will be offered to them before November 2000. The Land which is required to be allotted to them is stated to be around 6074 hectares and the State of Gujarat has in its possession 8146 hectares. The civic amenities in 40 new R&R sites are scheduled to be completed by December 2000 and these sites would serve to accommodate PAFs from submergence villages which would be getting affected at levels above RL 110 mtr. The Action Plan giving the village wise details is said to have been sent to NCA in June 2000 for its approval.

According to the said affidavit the balance number of PAFs remaining to be re-settled at Gujarat at FRL 138.68 mtr. is 10765. Taking into account that an additional area of 10% towards house plot and common civic amenities would be required in addition to the allotment of minimum 2 hectares of agricultural land, the total land requirement per PAF would be approximately 2.2 hectares. For planning purposes in respect of 10765 PAFs the land requirement would be about 23700 hectares. As against this requirement the status of land, as per the said affidavit, under different categories with the Government of Gujarat is stated to be as under:

Sr. No. PARTICULARS Land (In ha)	
1.	Land identified (offers received in respect of private land and Government land) 15716 ha.
2.	Land available (private land for which price is approved by Expert Committee and offer/counter offer conveyed and acceptance of land holder obtained. 480 ha.
3.	Land in possession of SSPA/GOG in 12 districts 8416 ha.
It is averred that between March and 21st June, 2000 the land in possession as well as the land identified has increased considerably.	
<b>Total</b>	<b>24612 ha.</b>

It has also been explained in the said affidavit that the Government of Gujarat has a well-established practice of procuring land for R&R at realistic market prices for willing sellers. Officers hold discussions with prospective

sellers, verify the suitability of land and after the prices is settled the same is procured through legal process of Land Acquisition Act and consent awards are passed so that the PAPs are assured of undisputed legal title free from all encumbrances. This process of negotiated purchase has been streamlined. At the instance of the GRA, a retired judge of the High Court is now appointed as Chairman of the Expert Committee with retired senior Government Secretaries as its members. This Expert Committee oversees the exercise of purchase of suitable land at the market price. At the instance of the GRA, PAPs are being issued Sanads for the land allotted to them which will ensure provision of a proper legal document in their favour.

Dealing with the term of the Award to the effect that Gujarat shall acquire and make available a year in advance of the submergence before each successive stage, land and house sites for rehabilitation of the oustees families from Madhya Pradesh and Maharashtra who are willing to migrate to Gujarat, the affidavit states that the Gujarat Government has already identified sufficient land for accommodating the balance PAFs remaining to be re-settled in Gujarat at FRL 138.68 mtr. In respect of PAFs upto RL110 mtr. Gujarat has sufficient land available to meet the R&R requirements but for the PAFs above RL 110 mtr. suitable land has already been identified and the same would be acquired and made available one year in advance of the submergence before each successive stage. The affidavit gives reason as to why it is not advisable for the State, at this stage, to acquire the total requirement of land for FRL in one go. What is stated in the affidavit is as follows:

- (i) Since at present GOG has sufficient land to meet R&R requirement to accommodate PAFs upto RL 110 m, it would not be necessary to acquire further land immediately, especially when the additional land would be required only after the R&R Sub-group and Environment Sub-group give approval for RL 95 m. to RL 110 m. after examining the preparedness at different stages. This would ensure that public money is not unnecessarily blocked for a long period.
- (ii) By acquiring land much before it would be required, problems of illegal trespass are likely to arise.
- (iii) The excess land would, by and large, remain fallow and no agricultural production would take place.
- (iv) If the land remains fallow for long the overall productivity of the land would be adversely affected.
- (v) All the time of allotment, the State Government would again have to spend a sizeable amount to remove weeds, bushes, small trees etc.
- (vi) The State Government would have to incur a sizeable amount to prevent tampering with the boundary marks, prevent neighboring farmers removing the top soil or from diverting natural drains passing through their fields towards the land purchased for R&R etc.

The affidavit also gives facts and figures showing that all

requisite civic amenities have been developed and made available at the R&R sites. Some of the salient features which are highlighted in this behalf are as under:

- A three-room primary school is provided in all MP/MH sites irrespective of the number of families resettled.
- A dispensary with examination room, medical equipment, medicines is provided in all MP/MH sites irrespective of the number of resettled families.
- 3439 PAFs (86%) out of the total MP/MH PAFs resettled in Gujarat have availed of the Rs. 45,000 financial assistance and built pucca core houses.
- Overhead tanks for drinking water are provided in large R&R sites.
- At the instance of GRA, toilets are being provided in the houses of PAFs with the help of NGOs.

The total cost incurred so far by the Government of Gujarat in providing the land and civic amenities upto May, 2000 is stated to be 194 crores. The Grievances Redressal Cell is stated to have redressed large number of grievances of the PAFs whether they were related to land, grant of civic amenities or others. The salient features of working of the Grievance Redressal Cell is stated to be as follows:

- At present 2 senior IAS officers with supporting staff are working exclusively for redressal of grievances.
- A reasoned reply is given to the applicants. The applicant is also informed that if he is aggrieved with the decision he may prefer an appeal to GRA within thirty days.
- The Single Window Clearance System's main objective is to proactively resolve grievances and to avoid delays in inter-departmental co-ordination.
- Tatkal Friyad Nivaran Samitis are held in the R&R sites to resolve grievance of the PAFs in an open forum.
- The PAFs are being involved at every stage of grievance redressal. The works have been carried out in most cases by the PAFs.
- The Agriculture Officers of the Agricultural Cell are actively helping, guiding the PAFs in their agricultural operations and upgrading their skills.

With a view to effectively rehabilitate and assimilate the PAPs Vasahat Samitis have been constituted in 165 R&R sites, consisting of 5 PAPs, one of whom is a female. This ensures the participation of the PAPs in the process of development and these Samitis are vested with the responsibility to sort out minor problems. With a view to ensure more effective participation in Panchayat affairs and better integration of PAPs an Order under Section 98 of the Gujarat providing that there shall be upto two invitees from amongst the PAPs at the sites in the village Panchayat within whose jurisdiction the R&R are situated. Pursuant to this 196 PAPs have been inducted as invitees to then Village Panchayats. The salient features of the rehabilitation programme of the PAPs are as follows:

- PAFs are given productive assets in kind (7000/PAFs) to purchase bullocks, bullock carts, oil engines etc.
- PAFs are given subsistence allowance (Rs. 4500/PAF) in cash to meet contingency needs in the initial period.
- Vocational training is provided to PAFs for improving their income levels, priority being given to those dependents who are not entitled to be declared as PAFs on their own rights. Tool kits are supplied either free or with 50% subsidy.
- NGOs are actively involved in all the rehabilitation activities such as conducting training classes.
- PAFs are being covered by the ongoing developmental schemes of the Government (DRDA, Tribal Sub Plan etc.)
- An extension (Agriculture) officers has been appointed for approximately every 150 families to guide them in agriculture operation and assist them in day to day problems (getting ration cards, khedut khatavahis etc.)
- In recent years focus is on empowering the PAFs and making them self dependent.

Medical cell has been set up for providing services and treatment to PAPS free of cost. The cell is headed by Deputy Director (Medical ) and is having a nucleus of medical experts consisting of a physician, a pediatrician, gynecologist, 21 MBBS doctor, pharmacists etc. The salient features of the medical help programme for the benefit of PAFs is stated to be as follows:

- The Medical Officers and paramedic staff are making house-to-house visits to motivate the PAFs to come forward to avail of the medical services.
- In all dispensaries, a full time multipurpose health worker (female) is available.
- Multi-specialization diagnostic/treatment camps are praised fortnightly, where advance investigations are diagnostic facilities like ECG, X-ray ultrasound are available.
- Patients requiring further services are brought to Government hospitals or any other specialty hospital and necessary treatment given free of cost.
- GOG has placed an order for a mobile medical hospital equipped with diagnostic and treatment equipments.
- A comprehensive health survey and medical check up covering 29423 PAFs has been completed. A special record system of family health folder and health profile of each PAF is prepared.
- Nutrition supplements are given to children (upto 6 years), expectant and lactating mothers through the Integrated mothers through the Integrated Child Development Scheme (ICDS).
- Special food supplement in the form of "Hyderabad Mix" is given to malnourished children and vulnerable target groups.

- School going children are covered under the Mid-Day Meal Scheme.
- Under TB Control, all chest symptomatic persons are screened by special examinations like sputum microscopy, X-ray, blood tests and persons found positive for TB are given domiciliary treatment under direct observation of doctors or paramedics. In 77 cases, treatment is completed and patients are cured.
- Under preventive health care, health education material is distributed and Health and Cleanliness Shibirs are organized.
- A special survey covering physically handicapped and mentally retarded persons has been organised and social welfare benefits given.
- Other National Health Programmes (maternal child health, immunization, school, health check up, family welfare etc.) are regularly conducted.

An Agricultural Cell has been set up in the SSPA which assist the Grievances Redressal Machinery in resolving the problem relating to the agricultural land. The salient features of this cell are as follows:-

- The Agriculture Cell is involved in purchasing land, supervision of land improvement works and processing.
- Agriculture training classes are organized for PAFs in the training institutes of the State Government.
- Assistance is given for availing crop loan credit from banks and extension education is imparted in matters of marketing, cropping pattern, use of improved seeds, insecticides and latest equipments.
- Afforestation was carried out in 33 R&R sites during 1999-2000 by planting 3500 saplings which are protected by bamboo tree-guards. Plantation is done along the roadside, common plots, school premises etc. In the remaining sites plantation work is undertaken by NGOs.

At the instance of GRA an educational cell has been set up in the SSPA. The main function of which is to improve the quality of education imparted and to improve the school enrolment. The salient features of this cell are as under:

- School enrolment which was 4110 in 1998-99, increased to 4670 in 1999 - 2000. Out of the 4670 students enrolled, 2126 were girls (46.3%).
- The number of schools is 170 and the number of teachers in 384. In the last academic year, 66 schools were upgraded by increasing the number of classes.
- SSPA is regularly sending the teachers for in-service training. So far 120 teachers have been imparted training.
- Every year during the period of June to August, a special drive is taken to increase the school enrolment.
- In the current year 150 adult education classes have been started in the R&R sites with the help of NGOs.

- An advisory committee has been created to make recommendations on how to improve the education being imparted. Members include faculty of MS University officers of Education Department, Principal of Teacher Training Centre.

It is further averred in this affidavit that at the instance of GRA a large number of measures have been taken to improve the organizational structure of SSPA so as to effectively meet the challenge of R&R and make the R&R staff accountable. The salient features of this are stated to be as follows:

- A strategic policy decision has been taken to create three separate divisions in SSPA for Rehabilitation, Re-settle and Planning. Each division is in charge of a senior level officer of the rank of Additional/Joint Commissioner.
- Staff strength in SSPA has been considerably augmented especially at the field level.
- To review the structural and functional aspects of SSPA services of a management consultancy agency (M/s TCS) has been engaged and draft report has been received and is being examined.
- A demographic survey is to be conducted to comprehensively document information regarding the PAPs with special reference to their family composition, marriage, births, deaths, life expectancy, literacy, customs, culture, social integration etc.
- Staff is being trained to sensitize them especially with regard to rehabilitation and second-generation issues. Senior level officers have been sent for R&R training at Administrative Staff College of India, Hyderabad,.

From the aforesaid affidavit it is more than clear that the GRA, of which Mr. Justice P.D. Desai, is the Chairman, has seen to the establishment of different cells and have taken innovative steps with a view to making R&R effective and meaningful. The steps which are being taken and the assistance given is much more than what is required under the Tribunal's Award. There now seems to be a commitment on the part of the Government of Gujarat to see that there is no laxity in the R&R of the PAPs. It appears that the State of Gujarat has realized that without effective R&R facilities no further construction of the dam would be permitted by the NCA and under the guidance and directions of the GRA meaningful steps are being undertaken in this behalf. In this connection we may take note of the fact that along with the said affidavit Sh. V.K. Babbar, again under the directions of the GRA, has given an undertaking to this Court, which reads as follows:-

1. As per this undertaking, inter alia, in respect of scattered pieces or parcels of lands in possession of the SSPA for R&R which do not add upto a contiguous block of 7 hectares by themselves or in conjunction with other lands steps will be taken to

purchase or acquire contiguous lands so that the said small pieces of land become a part of continuous block of 6 hectares or more. This exercise will be undertaken and completed cues of land become a part of continuous block of 6 hectares or more. This exercise will be undertaken and completed on or before 31st December, 2000. In case it is not possible to have a contiguous block of minimum of 6 hectares further directions will be sought from GRA or such piece o parcel of land will be put to use for other public purposes relating to R&R but which may not have been provided for in the NWDT award.

2. Henceforth, the land which is acquired or purchased for R&R purposes shall be contiguous to each other so as to constitute a compact block of 6 hectares.
3. Henceforth land to be purchased for R&R will be within a radius of 3 kms. from an existing or proposed new site and if there is a departure from this policy prior approval of the GRA will be obtained.
4. Demarcation of boundary of 5211 hectares of land whose survey has been undertaken by the GRA and carving out individual plots of 2 hectares for allotment to PAFs will be undertaken and completed on or before 31st December, 2000.
5. The other undertakings relate to soil testing and/or ensuring that suitable land is made available to the PAFs after the quality of land is cleared by the agriculture experts of the Gujarat Agriculture University. With regard to the lands in possession of the SSPA which are low lying and vulnerable to water logging during monsoon, an undertaking has been given that the land has been deleted from the inventory of lands available for R&R unless such lands are examined by the Agricultural Cell of SSPA and it is certified that the access to these lands is clear and unimpeded and that they are suitable for R&R. Compliance report in this regard is to be submitted to the GRA on or before 31st December, 2000.

In addition to the aforesaid undertaking of Sh. V.K. Babbar, undertakings of the Collectors of Khedr, Vadodara, Ahmedabad, Narmada, Panchmahal and Bharuch Districts have also been filed. Apart from reiterating what is contained in the undertaking of Sh. Babbar, in these undertakings of the Collectors, it is stated that necessary mutation entries regarding entering the name of SSPA/SSNNL in the village records of right in respect of the land in possession for R&R or PAFs likely to be re-settled in Gujarat have been made but the certification of these entries will be completed and the matter reported to the GRA before 31st August, 2000. If this is not done the land is to be deleted from the inventory of land available for R&R. Necessary mutation entries in the village records or rights regarding removal of encumbrances of original landholders shall also be completed by that date.

From what is noticed hereinabove, this Court is satisfied that more than adequate steps are being taken by the State

of Gujarat not only to implement the Award of the Tribunal to the extent it grants relief to the oustees but the effort is to substantially improve thereon and, therefore, continued monitoring by this Court may not be necessary.

On behalf of the State of Madhya Pradesh, in response to this Court's order dated 9th May, 2000, and affidavit of Sh. H. N. Tiwari, Director (tw), Narmada Valley Development Authority has been filed. It is stated therein that with a view to arrange re-settlement of the PAFs to be affected at different levels detailed instructions to the Field Officers of the submergence area were issued by Sh. Tiwari vide letter dated 20th May, 2000 in respect of all the aspects of resettlement of the PAFs. This is related to identification of land, processing of land acquisition cases and passing of the Award, taking of PAFs to Gujarat for selection of land, allotment of land to the PAFs who decide to remain in Madhya Pradesh and development of sites. There are 92 sites for re-settlement of the PAFs which are required to be established and out of these 18 are stated to be fully developed, development in 23 sites is in progress, 18 sites are such where location has been determined and land identified but development work has not started and 33 sites are such where location of land for the development is to be decided by the task force constituted for this purpose.

Dealing specifically with the states of PAFs to be affected at different levels this affidavit, inter alia, states that with regard to PAFs to be affected at EL 85 mtr. those of whom who have opted to go to Gujarat land has been offered to them by the Government of Gujarat, those PAFs who have changed their mind and now want to remain in Madhya Pradesh land is being shown to them in Madhya Pradesh.

It has not been categorically stated whether the PAFs who are so affected have been properly resettled or not. On the contrary, it is stated that no Awards in land acquisition cases have been passed in respect of six villages and it is only after the Awards are passed that house plots will be allotted and compensation paid. The provision for financial assistance for purchase of productive assets will be released when the PAFs shift and start construction of the houses. The reason for not making the payment in advance rightly is that if the grants are paid to the oustees before they shift they may possibly squander the grant and the State Government may be required to pay again to establish them on some self employment venture. For the re-settlement of PAFs in Madhya Pradesh out of ten relocation sites mentioned in the affidavit only five have been fully developed. It is also stated that 163 PAFs are resisting from shifting to Gujarat under the influence of anti dam activities, though they have been given notices containing offer of the land and house plots by the Government of Gujarat. In addition thereto 323 PAFs who were earlier resisting have now been persuaded and arrangements for selection of land for them in Gujarat has been initiated.

With regard to the R&R status of PAFs to be affected at EL 95 mtr. it is, inter alia, stated that those losing 25 per

cent of their holdings are entitled to be allotted cultivable land and notice were given to them to identify the land which can be allotted. In the said notice it was stated that the development process will be undertaken with regard to the said land only after it is selected by the PAFs. There is also a mention in the affidavit filed in the name of Narmada Bachao Andolan, the petitioner herein, not allowing demarcation of the submergence area and identification of the PAFs to be affected at EL 132.86 mtrs. (436 ft.). Six out of twenty five relocation sites required to be developed have been fully developed.

Affidavit on behalf of the State of Madhya Pradesh draws a picture of rehabilitation which is quite different from that of Gujarat. There seems to be no hurry in taking steps to effectively rehabilitate the Madhya Pradesh PAFs in their home State. It is indeed surprising that even awards in respect of six villages out of 33 villages likely to be affected at 90 mtr. dam height have not been passed. The impression which one gets after reading the affidavit on behalf of the State of Madhya clearly is that the main effort of the said State is to try and convince the PAFs that they should go to Gujarat whose rehabilitation package and effort is far superior to that of the State of Madhya Pradesh. It is therefore, not surprising that vast majority of the PAFs of Madhya Pradesh have opted to be re-settled in Gujarat but that does not by itself absolve the State of Madhya Pradesh of its responsibility to take prompt steps so as to comply at least with the provisions of the Tribunal's Award relating to relief and rehabilitation. The State of Madhya Pradesh has been contending that the height of the dam should be lowered to 436 ft. so that lesser number of people are dislocated but we find that even with regard to the rehabilitation of the oustees at 436 ft. the R&R programme of the State is nowhere implemented. The State is under an obligation to effectively resettle those oustees whose choice is not to go to Gujarat. Appropriate directions may, therefore, have to be given to ensure that the speed in implementing the R&R picks up. Even the interim report of Mr. Justice Soni, the GRA for the State of Madhya Pradesh indicates lack of commitment on the States part in looking to the welfare of its own people who are going to be under the threat of ouster and who have to be rehabilitated. Perhaps the lack of urgency could be because of lack of resources, but then the rehabilitation even in the Madhya Pradesh is to be at the expense of Gujarat. A more likely reason could be that, apart from electricity, the main benefit of the construction of the dam is to be of Gujarat and to a lesser extent to Maharashtra and Rajasthan. In a federal set up like India whenever any such Inter-State project is approved and work undertaken the States involved have a responsibility to co-operate with each other. There is method of settling the differences which may arise amongst them like, for example, in the case of Inter-State water dispute the reference of the same to a Tribunal. The Award of the Tribunal being binding the States concerned are duty bound to comply with the terms thereof.

On behalf of the State of Maharashtra affidavit in response

to this Court's order dated 9th MAY, 2000, the position regarding the availability of land for distribution to the PAFs was stated to be as follows:

(i) Total land made available by the Forest Department	4191.86 Hectares
(ii) Land which could not be allotted at present to PAF	
(a) Gaothan land (used residential purposes)	209.60 Hectares
(b) Land occupied by river/nallah/hills	795.62 Hectares
(c) Land under encroachment by third parties	434.13 Hectares

Therefore, the net land available At present for allotment was 4191.86	
(-) 1439.35	2752.51 Hectares

Total area of land allotted To 1600 PAFs

2434.01 Hectares

Remaining cultivable land Available with the State

2752 - 2434.01	318.50 Hectares
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It is further stated in this affidavit that out of 795.62 hectares of forest land which was reported to be uncultivable the State has undertaken a survey for ascertaining whether any of these lands can be made available for cultivation and distribution by resorting to measures like bunding, terracing and leveling. It is estimated that 30 to 40 hectares of land would become available. In addition thereto the affidavit states that the Government of Maharashtra has decided to purchase private land in nearby village for re-settlement of PAFs and further that GRA has been established and Justice S.P. Kurdukar, a retire judge of this Court has been appointed as its Chairman. It is categorically stated in this affidavit that the State in this affidavit that the State Government would be in a position to make these land available to all the concerned project affected families.

### CONCLUSION

Water is one element without which life cannot sustain. Therefore, it is to be regarded as one of the primary duties of the Government to ensure availability of water to the people.

There are only three sources of water. They are rainfall, ground water or from river. A river itself gets water either by the melting of the snow or from the rainfall while the

ground water is again dependent on the rainfall or from the river. In most parts of India, rainfall takes place during a period of about 3 to 4 months known as the Monsoon Season. Even at the time when the monsoon is regarded as normal, the amount of rainfall varies from region to region. For example, North-Eastern States of India receive much more rainfall than some of other States like Punjab, Haryana or Rajasthan. Dams are constructed not only to provide water whenever required but they also help in flood control by storing extra water. Excess of rainfall causes floods while deficiency thereof results in drought. Studies show that 75% of the monsoon water drains into the sea after flooding a large land area due to absence of the storage capacity. According to a study conducted by the Central Water Commission in 1998, surface water resources were estimated at 1869 cu km and rechargeable groundwater resources at 432 cu km. It is believed that only 690 cu km of surface water resources (out of 1869 cu km) can be utilized by storage. At present the storage capacity of all dams in India is 174 cu km. which is incidentally less than the capacity of Kariba Dam in Zambia/Zimbabwe (180.6 cu km) and only 12 cu km more than Aswan High Dam of Egypt.

While the reservoir of a dam stores water and is usually situated at a place where it can receive a lot of rainfall, the canals take water from this reservoir to distant places where water is a scarce commodity. It was, of course, contended on behalf of the petitioner that if the practice of water harvesting is resorted to and some check dams are constructed, there would really be no need for a high dam like Sardar Sarovar. The answer to this given by the respondent is that water harvesting serves a useful purpose but it cannot ensure adequate supply to meet all the requirements of the people. Water harvesting means to collect, preserve and use the rain water. The problem of the area in question is that there is deficient rainfall and small scale water harvesting projects may not be adequate. During the non rainy days, one of the essential ingredients of water harvesting is the storing of water. It will not be wrong to say that the biggest dams to the smallest percolating tanks meant to tap the rain water are nothing but water harvesting structures to function by receiving water from the common rainfall.

Dam serves a number of purposes. It stores water, generates electricity and releases water throughout the year and at time soft scarcity. Its storage capacity is meant to control floods and the canal system which emanates therefore is meant to convey and provide water for drinking, agriculture and industry. In addition thereto, it can also be a source of generating hydro-power. Dam has, therefore, necessarily to be regarded as an infrastructural project.

There are three stages with regard to the undertaking of an infrastructural project. One is conception or planning, second is decision to undertake the project and the third is the execution of the project. The conception and the decision to undertake a project is to be regarded as a policy decision. While there is always a need for such projects

not being unduly delayed, it is at the same time expected that as thorough a study as is possible will be undertaken before a decision is taken to start a project. Once such a considered decision is taken, the proper execution of these should be taken expeditiously. It is for the Government to decide how to do its job. When it has put a system in place for the execution of a project and such a system cannot be said to be arbitrary, then the only role which a Court may have to play is to see that the system works in the manner it was envisaged.

A project may be executed departmentally or by an outside agency. The choice has to be of the Government. When it undertakes the execution itself, with or without the help of another organisation, it will be expected to undertake the exercise according to some procedure or principles. The NCA was constituted to give effect to the Award, various sub-groups have been established under the NCA and to look after the grievances of the resettled oustees and each State has set up a Grievance Redressal Machinery. Over and above the NCA is the Review Committee. There is no reason now to assume that these authorities will not function properly. In our opinion the Court should have no role to play.

It is now well-settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the Courts are ill equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to set that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution. Even then any challenge to such a policy decision must be before the execution of the project is undertaken. Any delay in the execution of the project means over run in costs and the decision to undertake a project, if challenged after it's execution has commenced, should be thrown out at the very threshold on the ground of laches if the petitioner had the knowledge of such a decision and could have approached the Court at that time. Just because a [petition is termed as a PIL does not mean that ordinary principles applicable to litigation will not apply. Laches is one of them.

Public Interest Litigation (PIL) was an innovation essentially to safeguard and protect the human rights of those people who were unable to protect themselves. With the passage of time the PIL jurisdiction has been ballooning so as to encompass within its ambit subjects such as probity in public life, granting of largess in the form of licences, protecting environment and the like. But the balloon should not be inflated so much that it bursts. Public Interest Litigation should not be allowed to degenerate to becoming Publicity Interest Litigation or Private Inquisitiveness Litigation.

While exercising jurisdiction in PIL cases Court has not forsaken its duty and role as a Court of law dispensing

justice in accordance with law. It is only where there has been a failure on the part of any authority in acting according to law or in non-action or acting in violation of the law that the Court has stepped in. No directions are issued which are in conflict with any legal provisions. Directions have, in appropriate cases been given where the law is silent and inaction would result in violation of the Fundamental Rights or other Legal provisions.

While protecting the rights of the people from being violated in any manner utmost care has to be taken that the Court does not transgress its jurisdiction. There is in our Constitutional frame-work a fairly clear demarcation of powers. The Court has come down heavily whenever the executive has sought to impinge upon the Court's jurisdiction.

At the same time, in exercise of its enormous power the Court should not be called upon or undertake government al duties or functions. The Courts cannot run the Government nor the administration indulge in abuse or non-use of power and get a way with it. The essence of judicial review is a constitutional fundamental. The role of the higher judiciary under the constitution casts on it a great obligation as the sentinel to defend the values of the constitution and rights of Indians. The courts must, therefore, act within their judicially permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reason that it has been consistently held by this Court that in matters of policy the Court will not interfere. When there is a valid law requiring the Government to act in a particular manner the Court ought not to, without striking down the law, give any direction which is not in accordance with law. In other words the Court itself is not above the law.

In respect of public projects and policies which are initiated by the Government the Courts should not become an approval authority. Normally such decisions are taken by the Government after due care and consideration. In a democracy welfare of the people at large, and not merely of a small section of the society, has to be the concern of a responsible Government. If a considered policy decision has been taken, which is not in conflict with any law or is not mala fide, it will not be in Public Interest to require the Court to go into and investigate those areas which are the function of the executive. For any project which is approved after due deliberation the Court should refrain from being asked to review the decision just because a petitioner in filing a PIL allege that such a decision should no have been taken because an opposite view against the undertaking of the project, which view may have been considered by the Government takes a policy decision it is then not the function of the Court to go into the matter afresh and, in a way, sit in appeal over such a policy decision.

What the petitioner wants the Court to do in this case is precisely that. The facts enumerated hereinabove clearly

indicate that the Central Government had taken a decision to construct the Dam as that was the only solution available to it for providing water to water scarce areas. It was known at that time that people will be displaced and will have to be rehabilitated. There is no material to enable this Court to come to the conclusion that the decision was mala fide. A hard decision need not necessarily be a bad decision.

Furthermore environment concern has not only to be of the area which is going to be submerged and its surrounding area. The impact on environment should be seen in relation to the project as a whole. While an area of land will submerge but the construction of the Dam will result in multifold improvement in the environment of the areas where the canal waters will reach. Apart from bringing drinking water within easy reach the supply of water to Rajasthan will also help in checking the advancement of the Thar Desert. Human habitation will increase there which, in turn, will help in protecting the so far porous border with Pakistan.

While considering Gujarat's demand for water, the Government had reports that with the construction of a high dam on the river Narmada, water could not only be taken to the scarcity areas of Northern Gujarat, Saurashtra and parts of Kutch but some water could also be supplied to Rajasthan.

Conflicting rights had to be considered. If for one set of people namely those of Gujarat, there was only one solution, namely, construction of a dam, the same would have an adverse effect on another set of people whose houses and agricultural land would be submerged in water. It is because of this conflicting interest that considerable time was taken before the project was finally cleared in 1987. Perhaps the need for giving the green signal was that while for the people of Gujarat, there was not other solution but to provide them with water from Narmada, the hardships of oustees from Madhya Pradesh could be mitigated by providing them with alternative lands, sites and compensation. In governance of the State, such decisions have to be taken where there are conflicting interests. When a decision is taken by the Government after due consideration and full application of mind, the Court is not to sit in appeal over such decision.

Since long the people of India have been deriving the benefits of the river valley projects. At the time of independence, food-grain was being imported into India but with the passage of time and the construction of more dams, the position has been reversed. The large-scale river valley projects per se all over the country have made India more than self-sufficient in food. Famines which used to occur have now become a thing of the past. Considering the benefits which have been reaped by the people all over India with the construction of the dams, the Government cannot be faulted with deciding to construct the high dam on the river Narmada with a view to provide water not only to the scarcity areas of Gujarat but also to the small

areas of the State of Rajasthan where the shortage of water has been there since the time immemorial.

In the case of projects of national importance where Union of India and/or more than one State(s) are involved and the project would benefit a large section of the society and there is evidence to show that the said project had been contemplated and considered over a period of time at the highest level of the states and the Union of India and more so when the project is evaluated and approval granted by the Planning Commission, then there should be no occasion for any Court carrying out any review of the same or directing its review by any outside or "independent" agency or body. In a democratic set up, it is for the elected Government to decide what project should be undertaken for the benefit of the people. Once such a decision had been taken that unless and until it can be proved or shown that there is a blatant illegality in the undertaking of the project or in its execution, the Court ought not to interfere with the execution of the project.

Displacement of people living on the proposed project sites and the areas to be submerged is an important issue. Most of the hydrology projects are located in remote and inaccessible areas, where local population is, like in the present case, either illiterate or having marginal means of employment and the per capita income of the families is low. It is a fact that people are displaced by projects from their ancestral homes. Displacement of these people would undoubtedly disconnect them from their past, culture, custom and traditions, but then it becomes necessary to harvest a river for larger good. A natural river is not only meant for the people close by but it should be for the benefit of those who can make use of it, being away from it or near by. Realizing the fact that displacement of these people would disconnect them from their past, culture, custom and traditions, the moment any village is earmarked for take over for dam or any other developmental activity, the project implementing authorities have to implement R&R programmes. The R&R plans are required to be specifically drafted and implemented to mitigate problems whatsoever relating to all, whether rich or poor, land owner or encroacher, farmer or tenant, employee or employer, tribal or non-tribal. A properly drafted R&R plan would improve living standards of displaced persons after displacement. For example residents of villages around Bhakra Nangal Dam, Nagarjun Sagar Dam, Tehri, Bhillai Steel Plant, Bokaro and Bala Iron and Steel Plant and numerous other developmental sites are better off than people living in villages in whose vicinity no development project came in. It is not fair that tribals and the people in un-developed villages should continue in the same condition without ever enjoying the fruits of science and technology for better health and have a higher quality of life style. Should they not be encouraged to seek greener pastures elsewhere, if they can have access to it, either through their own efforts due to information exchange or due to outside compulsions. It is with this object in view that the R&R plans which are developed are meant to ensure that those who move must



be better off in the new locations at Government cost. In the present case, the R&R packages of the States, specially of Gujarat, are such that the living conditions of the oustees will be much better of the oustees will be much better than what they had in their tribal hamlets.

Loss of forest because of any activity is undoubtedly harmful. Without going into the question as to whether the loss of forest due to river valley project because submergence is negligible, compared to deforestation due to other reasons like cutting of trees for fuel, it is true that large dams cause submergence leading to loss of forest areas. But it cannot be ignored and it is important to note that this large dams also cause conversion of waste land into agricultural land and making the area greener. Large dams can also become instruments in improving the environment, as has been the case in the Western Rajasthan, which transformed into a green area because of India Gandhi Canal, which draws water from Bhakra Nagal Dam, This project not only allows the farmers to grow crops in deserts but also checks the spread of Thar desert in adjoining areas of Punjab and Haryana.

Environmental and ecological consideration must, of course, be given due consideration but with proper channellisation of developmental activities ecology and environment can be enhanced. For example, Periyar Dam Reservoir has become an elephant sanctuary with thick green forests all round while at the same time wiped out famines that used to haunt the district of Madurai in Tamil Nadu before its construction. Similarly Krishnarajasgar Dam which has turned the Mandya district which was once covered with shrub forests with wild beasts into a prosperous one with green paddy and sugarcane fields all round.

So far a number of such river valley projects have been undertaken in all parts of India. The petitioner has not been able to point out a single instance where the construction of Dam has, on the whole, had an adverse environmental impact. On the contrary the environment has improved. That being so there is not reason to suspect, with all the experience gained so far, that the position here will be any different and there will not be overall improvement and prosperity. It should not be forgotten that poverty is regarded as one of the causes of degradation of environment. With improved irrigation system the people will prosper. The construction of Bhakra Dam is a shining example for all to see how the backward area of erstwhile undivided Punjab has now become the granary of India with improved environment than what was there before the completion of the Bhakra Nangal project.

The Award of the Tribunal is binding on the States concerned. The said Award also envisages the relief and rehabilitation measures which are to be undertaken. If for any reason, any of the state governments involved lag behind in providing adequate relief and rehabilitation then the proper course, for a Court to take, would be to direct

the Award's implementation and not to stop the execution of the project. This Court, as a Federal Court of the country specially in a case of inter-State river dispute where an Award had been made, has to ensure that the bending Ward is implemented. In this regard, the Court would have the jurisdiction to issue necessary directions to the State which, though bound, chooses not to carry out its obligations under the Award. Just as an ordinary litigant is bound by the Award. Just as the execution of a decree can be ordered, similarly, the implementation of the Award can be directed. If there is a short fall in carrying out the R&R measures, a time bound direction can and should be given in order to ensure the implementation of the Award. Putting the project on hold is no solution. It only encourages recalcitrant State to flout and not implement the award with impunity. This certainly cannot be permitted. Nor is it desirable in the national interest that where fundamental right to life of the people who continue to suffer due to shortage of water to such an extent that even the drinking water becomes scarce, non-cooperation of a State results in the stagnation of the project.

The clamour for the early completion of the project and for the water to flow in the canal is not by Gujarat but is also raised by Rajasthan.

As per Clause 3 of the final decision of the Tribunal published in the Gazette notification of India dated 12th December, 1979, the State of Rajasthan has been allocated 0.5 MAF of Narmada water in national interest from Sardar Sarovar Dam. This was allocated to the State of Rajasthan to utilise the same for irrigation and drinking purposes in the arid and drought-prone areas of Jalore and Barner districts of Rajasthan situated on the international border with Pakistan, which have no other available source of water.

Water is the basic need for the survival of human beings and is part of right of life and human rights as enshrined in Article 21 of the Constitution of India and can be served only by providing source of water where there is none. The Resolution of the U.N.O. in 1977 to which India is a signatory, during the United Nations Water Conference resolved unanimously inter alia as under:

“All people, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantum and of a quality equal to their basic needs.”

Water is being made available by the State of Rajasthan through tankers to the civilians of these areas once in four days during summer season in quantity, which is just sufficient for the survival. The districts of Barmer and Jalore are part of ‘Thar Desert’ and on account of scarcity of water the desert area is increasing every year. It is a matter of great concern that even after half a century of freedom, water is not available to all citizens even for their basic drinking necessity violating the human right resolution of U.N.O. and Article 21 of the Constitution of

India. Water in the rivers of India has great potentiality to change the miserable condition of the arid, drought-prone and border areas of India.

The availability of drinking water will benefit about 1.91 lakh of people residing in 124 villages in arid and drought-prone border areas of Jalore and Barmer districts of Rajasthan who have no other source of water and are suffering grave hardship.

As already seen, the State of Madhya Pradesh is keen for the reduction of the dam's height to 436 ft. Apart from Gujarat and Rajasthan the State of Maharashtra also is not agreeable to this. The only benefit from the project which Rajasthan get is its share of hydel power from the project. The lowering of the height from 455 ft to 436 ft will take away this benefit even though 9399 hectares of its land will be submerged. With the reduction of height to 436 ft. not only will there be loss of power generation but it would also render the generation of power seasonal and not throughout the year.

One of the indicators of the living standard of people is the per capita consumption of electricity. There is, however, perennial shortage of power in India and, therefore, it is necessary that the generation increases. The world over, countries having rich water and river systems have effectively exploited these for hydel power generation. In India, the share of hydel power generated was as high as 50% in the year 1962-1963 but the share of hydel power started declining rapidly after 1980. There is more reliance now on thermal power projects. But these thermal power projects use fossil fuels, which are not wholly depleting fast but also contribute towards environmental polluting. Global warming due to the greenhouse effect has become a major cause of concern. One of the various factors responsible for this is the burning of fossil fuel in thermal power plants. There is, therefore, international concern for reduction of greenhouse gases which is shared by the World Bank resulting in the restriction of sanction of funds for thermal power projects. On the other hand, the hydel power's contribution in the greenhouse effect is negligible and it can be termed ecology friendly. Not only this but the cost of generation of electricity in hydel projects is significantly less. The Award of the Tribunal has taken all these factors into consideration while determining the height of the dam at 455 ft. Giving the option of generating eco-friendly electricity and substituting it by thermal power may not, therefore, be the best option. Perhaps the setting up of a thermal plant may not displace as many families as a hydel project may but at the same time the pollution caused by the thermal plant and the adverse affect on the neighborhood could be far greater than the inconvenience caused in shifting and rehabilitating the oustees of a reservoir.

There is and has been in the recent past protests and agitations not only against hydel projects but also against the setting up nuclear or thermal power plants. In each

case reasons are put forth against the execution of the proposed project either as being dangerous (in case of nuclear) or causing pollution and ecological degradation (in the case of thermal) or rendering people homeless and posing adverse environment impacts as has been argued in the present case. But then electricity has to be generated and one or more of these options exercised. What option to exercise, in our Constitutional framework, is for the Government to decide keeping various factors in mind. In the present case, a considered decision has been taken and an Award made whereby a high dam having an FRL of 455 ft. with capability of developing hydel power to be constructed. In the facts and circumstances enumerated hereinabove, even if this Court could go into the question, the decision so taken cannot be faulted.

### **DIRECTIONS**

While issuing directions and disposing of this case, two conditions have to be kept in mind, (i) the completion of project at the earliest and (ii) ensuring compliance with conditions on which clearance of the project was given including completion of relief and rehabilitation work and taking of ameliorative and compensatory measures for environmental protection in compliance with the scheme framed by the Government thereby protecting the rights under Article 21 of the Constitution. Keeping these principles in view, we issue the following directions.

1. Construction of the dam will continue as per the Award of the Tribunal.
2. As the Relief and Rehabilitation Sub-group has cleared the construction up to 90 meters, the same can be undertaken immediately. Further raising of the height will be only *pari passu* with the implementation of the relief and rehabilitation and on the clearance by the Relief and Rehabilitation Sub-group. The Relief and Rehabilitation Sub-Group will give clearance of further construction after consulting the three Grievances Redressal Authorities.
3. The Environment Sub-group under the Secretary, Ministry of Environment & Forests, Government of India will consider and give, at each stage of the construction of the dam, environment clearance before further construction beyond 90 meters can be undertaken.
4. The permission to raise the dam height beyond 90 meters will be given by the Narmada Control Authority, from time to time, after it obtains the above mentioned clearances from the Relief and Rehabilitation Sub-group and the Environment Sub-group.
5. The reports of the Grievances Redressal Authorities, and of Madhya Pradesh in particular, shows that there is a considerable slackness in the work of identification of land, acquisition of suitable land and the consequent steps necessary to be taken to rehabilitate the project oustees. We direct the States of Madhya Pradesh, Maharashtra and Gujarat to

implement the Award and given relief and rehabilitation to the oustees in terms of the packages offered by them and these States shall comply with any direction in this regard which is given either by the NCA or the Review Committee or the Grievances Redressal Authorities.

6. Even though there has been substantial compliance with the conditions imposed under the environment clearance the NCA and the Environment Sub-group will continue to monitor and ensure that all steps are taken not only to protect but to restore and improve the environment.
7. The NCA will within four weeks from today draw up an Action Plan in relation to further construction and the relief and rehabilitation work to be undertaken. Such an Action Plan will fix a time frame so as to ensure relief and rehabilitation *pari passu* with the increase in the height of the dam. Each State shall abide by the terms of the action plan so prepared by the NCA and in the event of a dispute or difficulty arising, representation may be made to the Review Committee. However, each state shall be bound to comply with the directions of the NCA with regard to the acquisition of land for the purpose of relief and rehabilitation to the extent and within the period specified by the NCA.
8. The Review Committee shall meet whenever required to do so in the event of there being any unresolved dispute on an issue which is before the NCA. In any event the Review Committee shall meet at least once in three months so as to oversee the progress of construction of the dam and implementation of the R&R programmes.

If for any reason serious differences in implementation of the Award arise and the same cannot be resolved in the Review Committee, the Committee may refer the same to the Prime Minister whose decision, in respect thereof, shall be final and binding on all concerned.

9. The Grievances Redressal Authorities will be at liberty, in case the need arises, to issue appropriate directions to the respective States for due implementation of the R&R programmes and in case of non-implementation of its directions, the GRAs will be at liberty to approach the Review Committee for appropriate orders.
10. Every endeavor shall be made to see that the project is completed as expeditiously as possible.

This and connected petitions are disposed off in the aforesaid terms.

DR. A.S. ANAND, CJI  
B.N. KIRPAL, J.

Bharucha, J. - I have read the judgement proposed to be delivered by my learned brother, the Honourable Mr.

Justice B.N. Kirpal. Respectfully, I regret my inability to agree therewith.

I do not set out the facts here: they are detailed in Brother Kirpal's judgement.

I take the view that the Sardar Sarovar Project does not require to be re-examined, having regard to its cost effectiveness or otherwise, and that the seismicity aspect of the Project has been sufficiently examined and no further consideration thereof is called for. I do not accept the submission on behalf of the petitioner that those ousted by reason of the canals must have the same relief and rehabilitation benefits as those ousted on account of the reservoir itself; this is for the reason that the two fall in different classes.

Having said this, I turn to the aspect of the environmental clearance of the Project. The Planning Commission accorded provisional sanction to the Project subject to the environment clearance thereof being obtained. At the relevant time, the responsibility for giving environmental clearance lay with the Department of Environment in the Ministry of Environment and Forest and the Union Government. The Department had in January, 1985 issued Guidelines for Environmental Impact Assessment of River Valley Projects. The Preface thereof stated that environmental appraisal was an important responsibility assigned to the Department. It involve the evaluation of the environmental implications of, and the incorporation of necessary safeguards in, activities having a bearing on environmental quality. While river valley projects were a basic necessity to a country whose economy was largely based on agriculture, over the years the realisation had dawned that river valley projects had their due quota of positive and adverse impacts which had to be carefully assessed and balanced for achieving sustained benefits. Therefore, it had been decided in the late 70s that all river valley projects should be subjected to a rigorous assessment of their environmental impact so that necessary mitigative measures could be duly incorporated therein at the inception stage. The Guidelines set out the procedure to be adopted for carrying out environmental impact assessments. In the Chapter headed Relevance of Environmental Aspects for River Valley Development Projects, the Guidelines stated, "Concern for environmental pollution is rather a recent phenomenon which has been triggered mainly by the backlash effect of accelerated industrial growth in the developed countries. The two major criteria - the project should maximize economic returns and it should be technically feasible - are no longer considered adequate to decide the desirability or even the viability of the project. It is now widely recognised that the development effort may frequently produce not only sought for benefits, but other - often unanticipated - undesirable consequences as well which may nullify the socio-economic benefits for which the project is designed." After reference to the strong feelings that were often expressed in favor of measures that would provide

the provision of adequate food and shelter to the million, the Guidelines stated, "Such strong feelings are easy to understand in the context of the prevailing economic stagnation. It does not, however, follow that the arguments advanced are valid. The basic flaw in these arguments is that they presume incompatibility between environmental conservation and the development effort." Apart from some selected cases where the uniqueness of the natural resources, like wildlife, flora and genetic pool, which demanded exclusive earmarking of a given region for their specific use, the majority of cases did not call for a choice between development projects and preservation of the natural environment; but in all cases there was great need to consider the environmental aspects along with other feasibility considerations. It was imperative to analyze whether the adoption of environmental measures was going to result in any short or long term social or economic benefits. A careful study of the direct costs involved, which would be caused by the absence of environmental mitigative measures on river valley projects, was an eye opener. These included effects on health, plant genetic resources, aquatic resources, water-logging and salinity of irrigated soils, deforestation and soil conservation. During the planning and feasibility assessment stages, several factors had to be taken into account, including short and long term impact on population and human settlements in the inundated and watershed areas, impact on flora and fauna ( wildlife ) including birds, impact on national parks and sanctuaries, on sites and religious significance and on forests, agriculture, fisheries and recreation and tourism. Requisite data for impact assessment was not readily available, this being relatively a new discipline, and it had to be generated through such field surveys as:

"Pre-impoundment census of flora & fauna, particularly the rare & endangered species, in submergence areas;

- Census of animal population and available grazing areas;
- Land-use pattern in the area with details of extent & type of forest;
- Pre-impoundment survey of fish habitat and nutrients levels;
- Ground water level, its quality, and existing water use pattern;  
Mineral resources, including injurious minerals, in the impoundment;
- Living conditions of affected tribals/ aboriginals etc.

The cost of proposed remedial and mitigative measures to protect the environment had to be included in the project cost. Mitigative measures included, among other things, compensatory afforestation. Only when the incorporation of environmental aspects in the project planning was made a part and parcel of all river projects would there be hope to protect and preserve "our natural environment and fulfill the objective of rapid economic development on the sustained basis while safeguarding the natural resources including the air, water, land, flora and fauna for the benefit

of present and future generations." The necessary data that was required to be collected for impact assessment was set out in the Guidelines. A chart of the impact assessment procedure was also continued in the Guidelines.

It appears, that, though it ought rightly to have been taken by the Ministry of Environment and Forest, the decision whether or not to accord environmental clearance to the Project was left to the Prime Minister.

A Note was prepared by the Ministry of Water Resources in or about October, 1986 on the environmental aspects of the Sardar Sarovar and the Narmada Sagera Multi Purpose Projects. It stated that a decision on the clearance of these projects from the environmental angle and under the Forest Conservation Act, 1980 had become a matter of urgency. Delays had occurred which had necessitated a recasting of the schedule. The Ministry of Environment and Forests had been doing its best to expedite the process of examination and clearance "but have been finding the material submitted inadequate and unsatisfactory....". While the State Governments had done their best to meet the requirements, "some of the information and action will necessarily take time and will have to proceed pari passu with the implementation of the project, which in any case will take a decade or more to complete." The Note stated that the Ministry of Water Resources shared the concerns and anxieties of the Ministry of Environment and Forests, as also the sense of urgency of the Governments of Gujarat and Madhya Pradesh, who felt that it was urgently necessary to take a decision in regard to the clearance. Under the sub-heading, "Should the projects be taken up at all?" , the Note stated that the abandonment of the projects would mean the abandonment of the generation of 2450 MW of power and of the possibilities of economic development which that quantum of power would bring, as also increased agricultural production resulting from the creation of an irrigation potential of 2.041 million hectares. No effective alternatives to the two projects were available. Reface to the adverse environmental impact of the project carried the implicit assumption that if the projects were not sanctioned the status-quo would remain and there would be no deterioration of the environment. Such an assumption was not warranted. Despite the submergence of land and displacement of a people and livestock, there was no case for the abandonment of the projects. What needed to be done was to take appropriate and adequate counter measures to off-set the environmental impact of the projects. In respect of the flora and fauna, it said, "Quantified data not yet available". In respect of the possibility of soil erosion from the catchment leading to excessive siltation of the reservoirs, it said, "Extent of critically degraded area needing treatment to be identified". Specifically in respect of the Sardar Sarovar Project, the Note said that for the area to be submerged in Maharashtra, the Maharashtra Government had proposed compensatory afforestation over an areas of 6490 hectares of the denuded forest in the impact area. In respect of fauna, the Note said that the Narmada Sagar Project authorities had

commissioned a wildlife census of the areas by the Zoological Survey of India and were negotiating terms with the Indian Institute of Wildlife Management, Dehradun, for carrying out detailed wildlife studies for re-location purposes. They proposed to undertake all necessary steps to minimize the adverse impact of the Project on wildlife. Gujarat and Maharashtra were also taking similar action with the help of specialized agencies. In respect of the projects flora, the Note said that the first preliminary survey in the area by the Botanical Survey of India was started in December, 1985 and it was estimated that the survey would take two to three years to be completed. In respect of catchment area treatment, the Note said that field surveys were likely to be started shortly. The Project authorities had identified three representative pilot project areas. The biological and engineering measures to be adopted in the treatment of the balance of the catchment area would be designed on the basis of the experience to be gained from these pilot projects. Under the sub-heading, "What still remains to be done", the Note stated, "While some plans have been made, studies undertaken and action initiated, it will be clear from the preceding paragraphs that much still remains to be done. Indeed, it is the view of the Ministry of Environment, Forest and Wildlife that what has been done so far whether by way of action or by way of studies does not amount to much, and that many matters are as yet in the early and preliminary stages." What was then set out was an enumeration of what then set out was an enumeration of what remained to be done. The survey of flora, to assess if there were any rare or threatened plant species, had been assigned to the Botanical Survey of India, which was expected to be completed in a period of two years. The Indian Institute of Wildlife Management, Dehradun was to consider and assess the impact on wildlife of the destruction of their habitat, and to prepare a project report for their relocation. After all these reports became available, a master plan had to be prepared. Field Surveys for the identification of the critically eroding areas was necessary and would take three years. The results from pilot studies would be available only after three years. Then under the sub-heading, "Options in regard to the Clearance of the Projects", the Note stated:

"There are two options:

- (i) As a number of studies, censuses, field survey, mapping of areas, etc., are likely to take between 2 and 3 years, one possibility is that all these should be completed; detailed operational plans for catchment treatment compensatory afforestation, rehabilitation and resettlement of affected population, and remedial or re-location measures for planned species, wildlife, etc., formulated; the responsibility for their implementation clearly identified; and then the projects should be given a clearance from the environmental and forest angles. This will mean a postponement of the clearance of projects by about 3 year.
- (ii) The other option is that the project should be given the necessary clearance now, with clear conditions and stipulations in regard to

the actions to be taken on the various environmental aspects and appropriate monitoring arrangements to ensure that the actions are taken in a time-bound manner.

The Arguments against a postponement of clearance by three years are very strong.."

The postponement of the decision at this stage seemed, to the writers of Note, "scarcely conceivable." A postponement would lead to substantial increases in project costs and the benefits expected from the projects would be delayed. Also the work that had already been done would be rendered in fruitless. The deferment of clearance by three years would put the organizational set-up that had been built up into a state of uncertainty, retard the momentum that had been gathered, and sap the organizational morale and motivation. The Note added, "Finally, the numerous studies, surveys, data collection exercise, plans for remedial measures, etc., which have been enumerated earlier would involve time, money and organization commitment. With the project decision postponed for three years, and with no assurance that at the end of that period, the decision will be positive, it is difficult to believe that all these studies, surveys and plans relating to the environmental aspects will be pursued with energy and enthusiasm, and the necessary resources devoted to them. In other words, the postponement of the decision in the interest of collecting the information relating to the environmental aspects and completing the formulation of the necessary operational plans may in fact prove to be a self defeating exercise. On the other hand, if the project decisions are taken now, subject firm conditions and stipulations regarding the environmental aspects, there is greater likelihood of these conditions being met... A possible argument against the immediate clearance of the projects could be that once the projects are cleared the management would concentrate on the engineering and construction aspects and would not pay adequate attention to the environmental and human aspects. There seems to be no need for such apprehensions. It should be entirely possible to give a conditional clearance and ensure that the conditions are properly met through a process of clear assignment of responsibility and frequent monitoring ... Moreover, even assuming that the postponement of a decision by three years will improve the availability of detailed information and the state of preparedness on environmental matters, there can be no greater assurance at that stage than there is now regarding the whole-hearted and effective implementation of the remedial and ameliorative measures. We would still have to depend on proper monitoring...". In conclusion, the Note urged that clearance from the environmental angle and under the Forest Conservation Act, 1980 be given immediately, subject to conditions and stipulations relating to the various environmental and related aspects outlined in Note. (Emphasis supplied)

Another Note was prepared by the Ministry of Water Resources and forwarded to the Additional Secretary to

the Prime Minister on 20th November, 1986. Insofar as catchment area treatment was concerned it concluded that it was certain that the catchment area treatment programmed could not be realistically formulated and assessed for at least another three years. Therefore, it was premature to comment on the efficacy or otherwise of the catchment area treatment programme with was still to be formulated. The action programme for Command area development was yet to be made available. The lining of canal network and the digging of tubewells in the Command could not be considered to be adequate. A lot of field work and planning was needed to be done to arrive at a workable and effective Command area development programme. As to compensatory afforestation, the land for the same was yet to be identified and procured before it could be evaluated for the purpose. In regard to the loss of flora and fauna, the following studies were considered absolutely essential to determine the adequacy or otherwise of the left over habitat to sustain wildlife:

“A wildlife census of the area” (ZSI will take at least 2-3 years to complete the survey):

- (i) Preparation of Master Plan showing all protected areas, National Parks, Wildlife Reserves, Reserve and Protected Forests, etc. on which should be superimposed the area to be taken up for various reservoirs, roads, canals, settlement colonies, etc.
- (ii) Study of the carrying capacity of the surrounding areas where the wildlife from the submergence area will disperse.”

In the circumstances, it was not considered possible to assess the impact of the loss of habitat on the wildlife and the overall loss of biological diversity. The absence and inadequacy of data on the following environmental aspects persisted:

- (i) Rehabilitation;
- (ii) Catchment Area Treatment
- (iii) Command Area Development;
- (iv) Compensatory Afforestation; and
- (v) Flora and Fauna.”

Considering the magnitude of rehabilitation, involving a large percentage of tribals, loss of extensive forest area rich in biological diversity, enormous environmental cost of the project and considering the fact that the basic data on vital aspects was still not available “there could be but one conclusion, that the project(s) are not ready for approval.” “There were two options in regard to the clearance. As a number of studies, censuses, field surveys, mapping of areas etc. was likely to take between two and three years, one possibility was that all these should be completed; detailed operational plans for catchments treatment, compensatory afforestation, rehabilitation and re-settlement of affected population and re-settlement of affected population and remedial or relocation measures for plant species, wildlife, etc. formulated; the

responsibility for their implementation clearly identified. and then the projects should be given a clearance from the environmental and forest angles. This could mean a postponement of the clearance of projects by about three years.” The other option was that the project should be given the necessary clearance with conditions and stipulations in regard to the action to be taken on the various environmental aspects with appropriate monetary arrangements. The Note recommended the latter option. (Emphasis supplied)

On 19th December, 1986 the Ministry of Environment and Forest sent to the Secretary to the Prime Minister a Note on the environment aspects of the Narmada Sagar and the Sardar Sarovar Projects. The Note stated that it covered the major environmental issues which included the rehabilitation of the affected population, catchment area treatment, Command area development, compensatory afforestation and the loss of flora and fauna. It explained the then status of each of these aspects in terms of availability of data and plans and the readiness to execute them. It said that that components of the environmental aspect like the higher incidence of water boned disease and loss of mineral reserves were important but were not dealt with in detail in the note. It stated that in respect of catchment area treatment, the requirement was of demarcation of critically degraded areas on the basis of aerial photographs, satellite imagery and ground checks; creation of a chain of nurseries of suitable species for biological treatment of the catchment areas; and preparation of phased action programme for biological an engineering treatment of the degraded catchment area. Considering that catch met area treatment on an intensive scale was imperative, both to reduce silt load and to maintain ecological balance, and keeping in view the fact that the interpretation of the aerial photographs and satellite imagery would take at least one year for completion, to be followed by ground truth checks; the detailed land and soil surveys would take three years to be completed; the geomorphological studies to suggest the engineering and biological treatment for the eroded areas were still to be taken up and the chain of nurseries need to provide the necessary saplings in adequate quantity along with manpower and other infrastructure requirements were still to be mobilised, it was “reasonable to conclude that the catchments area treatment programme can be realistically formulated only after three year when these date become available“. Command area development was to achieve the prevention of water-logging and salinity, the optimization of water utilization and the maintenance of water quality. A detailed survey of the Command area was required on priority to prepare a package of the nature and quantity of development and drainage and on farm works to fully utilise the irrigation potential. An action programme was yet to be detailed. The Ministry of Water Resources was preparing an Evaluation Report covering the extent of likely water-logging and salinity problems and the effectiveness of measure proposed or likely to be proposed to combat these problems “ as per the action programme

to be formulated". In so far as compensatory afforestation was concerned, the Project authorities had not been able to identify non-forest land for compensatory afforestation and had proposed to undertake afforestation on double the extent for degraded forest land, which proposal was fairly detailed and seemed satisfactory. In the matter of the loss of flora and fauna the Note stated "that the forest area, specially affected by the Narmada Sagar Project, represents area harboring rich heritage of genetic resources as well as wildlife. The preliminary study carried out by the Environmental Planning and Coordination Organization, Bhopal as well as the observations made by the World Bank clearly underlined the need for preparing master plan showing not just the present status but also the likely scenarios after project was implemented. The prime concern was to ascertain the loss of biological diversity and whether the wildlife would be able to sustain itself after the destruction of its habitat. The following studies were considered absolutely essential both to determine the loss of flora and the adequacy or otherwise of the left over habitat to sustain the wildlife:

- A wildlife census of the area (ZSI will take at least 2-3 years to complete the survey):
- Preparation of Master Plan showing all protected areas i.e. National Parks, Wildlife Reserves, Reserve and Protected Forests, etc. on which should be superimposed the areas cannot be taken up for various reservoirs, roads, canals, settlement colonies, etc.;
- Study of the carrying capacity of the surrounding areas where the wildlife from the submergence area will disperse.

These studies are considered specially important in the case of NSP. The work initiated by BSI and ZSI at the request of the Project Authorities will be completed only by 1989. The other studies have not yet been initiated. Under the circumstances, it is not possible to assess the impact of the loss of habitat on the wildlife and the overall loss of biological diversity and genetic reserves.

Even if one were to assume that the forest to be destroyed do not contain genetic resources, which in any case cannot be valued, the simple loss of the forests would have on environmental cost estimated at several thousand crores of Rupees as per norms developed by FRL.

The environmental cost is thus colossal".

The Note concluded:

- 1) Taking note of the fact that the project formulation has been in progress for more than three decades and the active interaction of the Project authorities with the Department of Environment has been going on for almost three years, the absence and inadequacy of data on some important environmental aspects still persists.

- 2) In an objective sense the NSP is not ready for clearance from environmental angle. Even though SSP is aim a fairly advanced stage of preparedness, it is neither desirable nor recommended that the SSP should be given approval in isolation on technical and other grounds the Project has already commenced, this factor must play a part in their deciding whether or not environmental clearance should be accorded. Until environmental clearance to the Project is accorded by them, further construction work on the dam shall cease.

The Union of India has issued a notification 1994 called the "Environmental Impact Assessment Notification 1994". (and amended it on 4th May, 1994). Its terms are not applicable to the present proceedings, but its provisions are helpful in so far as they prescribe who is to assess the environmental impact assessment reports and environmental management plans that are submitted by applicants for new project, including hydro-electric projects. The notification says, "The reports submitted with the application shall be evaluated and assessed by the Impact Assessment Agency, and if deemed necessary it may consult a Committee of Experts, having a composition as specified in Schedule -III of the Notification. The Impact Assessment Agency (IAA) would be the Union Ministry of Environment and Forests. The Committee of Experts mentioned above shall be constituted by the IAA or such other body under the Central Government authorized by the IAA or such other body under the Central Government authorized by the IAA in this regard.....". Schedule III of the notification reads thus:

**"COMPOSITION OF THE EXPERT COMMITTEE FOR ENVIRONMENTAL IMPACT ASSESSMENT.**

1. The Committees will consist of experts in the following disciplines:
  - (i) Eco-System Management
  - (ii) Air/Water Pollution Control
  - (iii) Water Resource Management
  - (iv) Flora/Fauna Conservation and Management
  - (v) Land Use Planning
  - (vi) Social Sciences/Rehabilitation
  - (vii) Project Appraisal
  - (viii) Ecology
  - (ix) Environmental Health
  - (x) Subject Area Specialists
  - (xi) Representatives of NGOs/Persons concerned with Environmental Issues.
2. The Chairman will be an outstanding and experienced ecologist or environmentalist or technical professional with wide managerial experience.
3. The representative of IAA will act as Member-Secretary.
4. Chairman and members will serve in their individual capacities, except those specifically nominated as representative.
5. The membership of Committee shall not exceed 15".

The Environmental Impact Agency of the Union Ministry of Environment and Forests shall now appoint a committee of experts composed of experts in the field mentioned in Schedule II of the notification and that committee of experts shall assess the environmental impact of the Project as stated above.

When the writ petition was heard at the admission stage, this Court was most concerned about the distressing state of the relief to and rehabilitation of those ousted on account of the Project. The proper implementation of relief and rehabilitation measures was the aim of the Court at the time; but it was not contemplated that the other issues in the writ petition would not to be considered at the stage of its final hearing.

The many interim orders that this court made in the years in which this writ petition was pending show how very little had been done in regard to the relief and rehabilitation of those ousted. It is by reason of the interim orders, and, in fairness, the co-operation and assistance of learned counsel who appeared for the States, that much that was wrong has now been redressed. The states have also been persuaded to set up Grievance Redressal Authorities and it will be the responsibility of these Authorities to ensure that those ousted by reason of the Project are given relief and rehabilitation in due measure.

The State are lagging behind in the matter of the identification and acquisition of land upon which the oustees are to be resettled. Having regard to the experience of the past, only the Grievance Redressal Authorities can be trusted by this Court to ensure that the States are in possession of vacant lands suitable for the rehabilitation of the oustees. During the time that it takes to assess the environmental impact of the Project, the States must take steps to obtain, by acquisition or otherwise, vacant possession of suitable lands upon which the oustees can be rehabilitated. When the Project obtains environmental clearance, assuming that it does, each of the Grievance Redressal Authorities of the States of Gujarat, Madhya Pradesh and Maharashtra must certify, after inspection, before work on the further construction of the dam can begin, that all those ousted by reason of the increase in the height of the dam by 5 meters from its present level have already been satisfactorily rehabilitated and also that suitable vacant land for rehabilitating all those who will be ousted by the increase in the height of the dam by another 5 meters is already in the possession of the respective State; and this process must be repeated for every successive proposed 5 meter increase in the dam height.

Only by ensuring that relief and rehabilitation is so supervised by the Grievance Redressal Authorities can this Court be assured that the oustees will get their due.

It is necessary to provide for the contingency that, forgone or other reason, the work on the Project, now or at any

time in future, does not proceed and the Project is not completed. Should that happen, all oustees who have been rehabilitated must have the option to continue to reside where they have been rehabilitated or to return to where they were ousted from, provided such place remains habitable, and they must not be made at all liable in monetary or other terms on this account.

When the writ petition was filed the process of relief and rehabilitation, such as it was, was going on. The writ petitioners were not guilty of any laches in that regard. In the writ petition they raised other issues, one among them being related to the environmental clearance of the Project. Given what has been held in respect of the environmental clearance, when the public interest is so demonstrably involved, it would be against public interest to decline relief only on the ground that the Court was approached belatedly.

I should not be deemed to have agreed to anything stated in Brother Kirpal's judgement for the reason that I have not traversed it in the course of what I have stated.

In the premises,

1. The Environmental Impact Agency of the Ministry of Environment and Forests of the Union of India shall forthwith appoint a Committee of Experts in the fields mentioned in Schedule III of the notification dated 27th January, 1994, called the Environmental Impact Assessment Notification, 1994.
2. The Committee of Experts shall gather all necessary data on the environmental impact of the Project. They shall be free to commission or carry out such surveys and studies and the like as they deem necessary. They shall also consider such surveys and studies as have already been carried out.
3. Upon such data, the Committee of Experts shall assess the environmental impact of the Project and decide if environmental clearance to the Project can be given and, if it can, what environmental safeguard measures must be adopted, and their cost.
4. In so doing, the Committee of Experts shall take into consideration the fact that the construction of the dam and other work on the Project has already commenced.
5. Until environmental clearance to the Project is accorded by the Committee of Experts as aforesaid, further construction work the dam shall cease.
6. The Grievance Redressal Authorities of the States of Gujarat, Madhya Pradesh and Maharashtra shall ensure that those ousted by reason of the Project are given relief and rehabilitation in due measure.
7. When the Project obtains environmental clearance, assuming that it does, each of the Grievance Redressal Authorities of the States of Gujarat, Madhya Pradesh and Maharaashtra shall, after inspection, certify, before work on the further construction of the dam can begin, that all those ousted by reason of the increase in the height of the



dam by 5 meters is already in the possession of the respective States.

8. This process shall be repeated for every successive proposed 5 meter increase in the dam height.
9. If for any reason the work on the Project, now or at any time in the future, cannot proceed and the Project is not completed, all oustees who have been rehabilitated shall have the option to continue to reside where they have been rehabilitated or to return to where they were ousted from, provided such place remains habitable, and they shall not be made at all liable in monetary or other terms on this account.

The writ petition is allowed in the aforesaid terms. The connected matters are disposed of in the same terms.

No order as to costs.

(S.P. Bharucha, J.)

NAVINCHANDRA N. MAJITHIA Appellant

VS

STATE OF MEGHALAYA AND OTHERS Respondents

CORAM: K.T. THOMAS, R.P. SETHI AND S.N. VARIAVA, JJ.

CRIMINAL LAW - Cr. P.C. - SECTION 2(hr) & 156 - Investigation - A company based in Mumbai claimed ownership of certain lands - Another company based in Shillong entered into a transaction with the Mumbai Company - Certain disputes arose and Shillong Company filed an FIR with the Shillong Police - Shillong Company field a writ petition before the Guwahati High Court seeking appropriate direction with regard to expediting the investigation - Single Judge directed the Shilling Company to deposit an amount which would be required to undertake the investigation and for the visit of the Shillong Police to Mimbai - Division Bench did not interfere with the order of the Single Judge - Appellant, who was not made a party to the writ petition, filed a writ petition in the Mumbai High Court for quashing.

Judgement dated October 16,2000 in CrI. A. No. 874 of 2000 (Arising out of S.L.P. (CrI.) No. 1252 of 1999)

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**JUDICIAL POWER**

**CHILE**

**\*\*UNOFFICIAL TRANSLATION\*\***

*Translated by Jeanne Ojeda, Center for Governmental Responsibility, University of Florida College of Law*

Santiago, Nineteenth of March nineteen hundred and ninety-seven.

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## WHEREAS

Eliminate fundamentals 23 to 32 and 36 to 40 of the appealed sentence; moreover replace with the following:

1) That the Extended Resolution No. 02, of April 22, 1996, dictated by the Comisión Regional del Medio Ambiente de Magallanes y de la Antártica Chilena (Regional Environmental Commission of Magallanes and Chilean Antarctic), of which an authorized copy containing 87 pages, mentioned in No. 2 of the exposition of reasons, “established in Paragraphs 2 and 3, Articles 8 and following; 80 and 81 of Law 19.300 concerning General Bases of the Environment”;

2) That, for its part, Article 1 of the referred law indicates that the System of Evaluation of Environmental Impact, which is regulated by Paragraph 2 of Title II of this law, becomes official once published in the Diary of Official Rules, referred to in Article 13 of the same law;

3) That, precisely in Paragraph 2 of the mentioned law where the System of Evaluation of Environmental Impact is regulated and, in which is contemplated among other things, the Environmental Impact Studies, emphasize that those projects or activities noted in Article 10 could only be executed or modified after evaluation of environmental impact, in agreement with the rules established in the referred law.

Thus, we say that the legal title of all the projects or activities understood and noted in Article 10 should provide a Declaration of Environmental Impact or elaborate an Environmental Impact Study, before the Comisión Regional del Medio Ambiente (Environmental Regional Commission) of the region in which the work being contemplated is authorized prior to its execution. And it is precisely the same legal disposition which is entrusted to indicate which projects or activities are susceptible to cause environmental harm, within which are encountered development projects or forest exploitation of land covered with native forests;

4) That, the parties are in agreement inasmuch as Paragraph 2 of the cited law is not in force, in relation to the Environmental Impact Studies, the Empresa Forestal Trillium, Ltda., towards an end of analyzing the environmental impacts of the project named “Rio Cándor”, voluntarily submit to the Environmental Impact Evaluation System studied in the referred paragraph, presented in effect before the Comisión Regional de Magallanes y Antártica Chilena (Regional Environmental Commission of Chilean Antarctic), appealed in those sentences, an Environmental Impact Study, the 16th day of November 1995 and an Addendum to same, the 1st of March 1996;

5) That, the Comisión Regional de Magallanes (Environmental Regional Commission of Magallanes), upon conclusion of the process of Environmental Impact

Evaluation, dictated the resolution of this method, which qualifies as “environmentally viable” the project “Rio Cándor” of Forestal Trillium Ltda., on condition that certain requirements are completed, such as those indicated in the same resolution;

6) That, as was stated, Law 19.300 was not in force, inasmuch as those Environmental Impact Studies and, therefore, the entity could not dictate the resolution opposing this law, based on previous occurrences which, at this time, are not contemplated in the law, and in so doing this entity was involved in an illegal action. Therefore, in performing such acts, the entity disobeyed Articles 6 and 7 of the Political Constitution of the Republic which establishes that the agencies of the state should follow the Constitution and conform to it. Similarly, these entities must act within its competition and in a manner prescribed by law, all acts against these articles are null and will create responsibilities and sanctions which the law dictates;

7) That, the entity indicates, because of a lack of regulations, it applies a Presidential Directive referring to the matter, dictated the 30th of September 1993 and that, for those who voluntarily submit to an Environmental Impact Study, said proceeding “will be mandatory as much for the proponent as for the public institutions involved”. Notwithstanding, other normal legal decrees or rules can establish specific restrictions or conditions to exercise the rights or liberties, but in no case by a “Presidential Directive”;

8) That the recourse of general protection only proceeds when the action or omission is illegal or arbitrary; conversely, in the case of such actions of protection referring to the environment, requires that the action be illegal and arbitrary, contrary to regulation and, furthermore, lacks reasonable basis;

9) That, as was mentioned in the sixth principle, resolution on this type of protection is illegal; and, furthermore, is arbitrary.

In effect, analysis of those technical reports, contained in the folder of documents, among which are more prominent specialized organizations of this type, such as the Corporación Nacional Forestal (National Forestry Corporation), Servicio Agrícola y Ganadero (Agricultural and Cattle Services), Dirección General de Aguas (Director General of Waters), Servicio de Salud de Magallanes (Health Service of Magallanes), Dirección General de Pesca (Director General of Fisheries), Gobernación Marítima de Punta Arenas (Maritime Governor of Punta Arenas), Corporación de Fomento de la Producción e Instituto de Fomento Pesquero (Corporation for the Development of Production and Institute of Fishing Development), formulate suggestions and ideas, or propose the fulfillment of previous conditions for the development of the aforementioned project. Thus, by way of example,

in the study of the Corporación Nacional Forestal (National Forestry Corporation), they conclude that the information presented in the study of Environmental Impact is not sufficient to make a decision concerning the sustainability of the project, because it is not completely accredited the existence of forestry resource and its fundamental characteristics, as well as the magnitude of those environmental impacts and the precise manner in which they will be confronted in time; for its part, the study of Agricultural and Cattle Services concludes that the petitioner cannot guarantee the project is ecologically sustainable;

10) That, on the other hand, the Technical Committee, in their pertinent study, indicates that “this Committee has concluded that there do not exist sufficient elements to approve the environmental viability of the Project Rio Cóndor forestry area of Forestal Trillium Ltda.”;

11) That, following the findings of the committee they certified as “environmentally viable” the Project “Rio Cóndor”, to operate conditionally under certain requirements; however, since these requirements were not sufficient the project acted in an arbitrary way because there were no reasonable bases;

12) That acting illegally and arbitrarily the entity violates the constitutional guarantee contemplated in Article 19, No. 8 of the Political Constitution of the Republic; that is, the right of people choosing to live in an environment free of contamination. In effect, said disposition imposes on the State the obligation to observe that this right is not affected; and, at the same time, guard the preservation of nature and the latter refers to maintenance of the original conditions of natural resources, reduce to a minimum human intervention, and, Paragraph 2 of the same article establishes that “the law can establish specific restrictions in determining rights and liberties to protect the environment”. Moreover, this constitutional guarantee is complemented by numerous legal precepts, among them Law 19.300 concerning General Bases of the Environment which resolves in Article 1 “The right to live in an environment free from contamination, the protection of the environment, the preservation of nature and the conservation of native environment will regulate the enforcement of this law...”. It is worth noting, the appellants have the right, furthermore, to urge for the preservation of nature and the conservation of native environment, an activity that naturally competes with persons who live close to the physical area where natural resources are being exploited, because they will be affected;

13) That, lastly, because of the lack of lawful activity by the appellants to fulfill the law, claimed by Empresa Forestal Trillium, the need to indicate that the right to live in an environment free from contamination is a human right by constitutional law, which presents a double character: subjective public right and collective public right. The first

aspect is characterized by the corresponding exercise, as indicated by Article 19 of the Political Constitution towards all persons, obliged to be protected and sheltered by the authorities through ordinary sources and protective sources. And, as for the second right, the public collective right, such right is designed to protect and shelter social rights of collective character, whose protection affects the entire community, not only on the local level but also on the national level, because they compromise the bases of existence of society and country, that to destroy or limit the environment and natural resources, you limit the possibilities of life and development not only of the present generations but also of future ones. In this respect, this guarantee as a whole affects a plurality of subjects who found themselves in the same situation, and, even though it carries a great social damage, does not cause significant or appreciable damage to the individual.

On the other hand, the native environment, the preservation of nature referred to in the Constitution, which she ensures and protects, all that naturally surrounds us and which permits the development of life and refers as much to the atmosphere as to the earth and its waters, to the flora and fauna, all of these conform to nature and its ecological systems of equilibrium among those organisms and the medium in which they live. And so, all the native and lawful people who inhabit this State and who suffer a violation of their right to an environment free from contamination assures Article 19, No. 8 of the fundamental text.

And in agreement, moreover, with the disposition of Article 20 of the Political Constitution of the Republic, we declare that we REVOKE the sentence of 8 July last, containing 532 pages, and in its place we grant the protection recourse interposed on page 1 of the Constitution, leaving without effect the Extended Resolution No. 02 of 22 April of 1996, dictated by the Comisión Regional de Magallanes y de Antártica Chilena (Regional Environmental Commission of Magallanes and Chilean Antarctic).

We mention that Minister don Germán Valenzuela Erazo was to declare that the sentence is without prejudice towards what the corresponding authority may decide in the future after considering portions which were the bases for the appeal.

Accordingly against the vote of Minister don Osvaldo Faúndez and of mediating Attorney don Manuel Daniel, who confirmed the denial of the appealed verdict for the following reasons:

1) That transitory Article 1 of Law 19.300, concerning General Environmental Bases resolves that the second paragraph of Title II of this legal body “will be in force once published in the Official Diary of Rules which refers to Article 13”, that is, who should determine the procedures for carrying out those studies of environmental impact, of which the system

- of evaluation regulates the second paragraph; and it is a fact that this rule has not been published;
- 2) That, such a resolution is based and applies, precisely, the second paragraph of Title II of Law 19.300, being incurred this way in a legal infraction against transitory Article 1 of the cited law;
  - 3) That, it is not that the laws which belong to a regulation are complementary in this case, but which themselves have immediate implementation and for this reason can apply even without by-laws, because, on the other hand, the proper legislator is the one who ordered that certain regulations are not enforced without the publication of the normal by-laws. In this way the administrative authority was impeded from implementing in advance without incurring illegality;
  - 4) That, judicially, such application of legal dispositions cannot be evident because the Empresa Forestal Trillium Ltda. voluntarily was interested in the project which originated with this appeal, voluntarily accepted the proceedings which applied; and the fact that this procedure was contained in a “Presidential Directive” — this was only an instruction in the terms of Article 32, No. 8 of the Political Constitution — it is impossible that this administrative act legally replaces the rules of law, because such legal and constitutional proceedings will not be enforced by mere instructions;
  - 5) That, notwithstanding, in this case which invokes protection for the entity indicated in No. 8 of Article 19 of the Constitution, is to say, the right to live in an environment free from contamination, the aggravated act should be both illegal and arbitrary, according to the final paragraph in Article 20 of the same Charter; and the judgment of those dissidents cannot attribute arbitration to such a resolution, since it was not an act which originated from capriciousness or irrationality; on the contrary, even though mistakenly it was dictated after a proceeding that is based fundamentally in the law with foresight and which should have been applied when the opportunity arose;
  - 6) That leads us to conclude that the resource was mishandled. The fact is, the appellants who reside in the National Congress, Valparaiso, and other persons who reside in the city of Punta Arenas, do not say nor demonstrate in which manner they are affected, because in reality they perform independently, in the interest of the community; for this reason, lack the rights to create the collective bargaining they desire;
  - 7) That, in effect, although you can resort to protection for one only or for others in your name (Article 20 of the Political Constitution) “and since they do not have a special mandate and even by telegraph” (No. 2 of the 1992 Records), is a basic requisite, in order to approve the law, to whom or for whom protection is requested could be a specific person “affected” in the lawful exercise of their right, that is lawful to act, even though others request the act for him; because it is not recognized as a popular act which can be commenced by any person, in the sole interest of the community, or merely objective in favor of the judiciary order: the rule of right which has to be restored — in the terms of Article 20 of the Constitution — is what will be altered for the damage suffered, the affected with the offended, through a personal, concrete interest, which was compromised;
  - 8) That, as far as the guarantee of equality under the law, which is aggravated, it is well known that every person should receive the same treatment from the authorities which has been given to others who have found themselves in a similar situation, and, conversely, this treatment cannot be equal if the situation is different; but those appellants state that an arbitrary difference was established in favor of the Empresa Trillium, “against all those citizens who are obliged to respect and obey the majesty of the law”, and furthermore indicates that such a resolution creates an intolerable and unjust situation to the community which opposes the execution of this project; and nothing expresses nor explains in which way the resolution arbitrarily discriminates against those appellants in relation to the aforementioned company;
  - 9) That there does not appear a guarantee of No. 8 of Article 19 of the Constitution which could be obtained following the resources, “because the development of project “Río Cóndor”, in the conditions which have been approved, signify the extinction or significant detriment of the native forest of the Region”; notwithstanding, those appeals do not explain nor demonstrate that their right has been affected, since they do not support that they themselves have been wronged, if not those members of the community in general, citing 3 pages of an author who affirms precisely that there is here “widespread interest”, not individual, on behalf of the environment; this is not the interest, but direct and personal, one which cautions protection of the resource. The duty of the State in general is to protect this right and the preservation of nature; if not enforced, could result in other legal requirements; but not in this case;
  - 10) That, likewise, it is imprudent to admit the right of property, as well as the basis of the resource, has been violated, inasmuch as here is “a type of corporate property” upon the native environment which is significant in the country; but, in reality,

what No. 24 of Article 19 of the Constitution ensures is: “the right of property in its diverse species on all classes of personal and corporate property”; and the recurring resolution refers to property on which those plaintiffs do not pretend to have actual right nor subjective right to demand the case; it should be reiterated here that the public interest for whom you intercede is not sufficient for the active legislation of the plaintiffs in such action;

- 11) That, analogously, should reject the basis of the damage which is said to have occurred as “the right to develop whatever economic activity which is not contrary to morale, to public order or to national security, respecting the legal standards which they regulate” (Article 19 No. 21 of the Political

Constitution), because here also it does not explain the way how such guarantee will be affected by the action of the plaintiffs: they limit themselves to insist in the illegalities which affect the appealed resolution, which, once more, will go against the general economic activity in relation with the native forest.

For all those reasons, those plaintiffs estimate that they should conform to the appealed decision, declaring without cause the appeal of protection inferred on page 1.

Registered and returned.

No. 2.732-96.

### ***III***

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## ***Enforcement***

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**CIGARETTE SMOKING IN PUBLIC PLACES**

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

Present: Ag. Chief Justice Sri. AR. Lakshmanan & Justice Sri. K. Narayanakurup

**Monday, the 12<sup>th</sup> day of February, 1999**

**O.P.No. 24160 of 1998-A**

K. Ramakrishnan and others                      Petitioners

Vs

State of Kerala and others                      Respondents

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## J U D G M E N T

NARAYANA KURUP, J.

1. This is an original petition highlighting the public health issue of the dangers of passive smoking and in which prayers are made to declare that smoking of tobacco in any form, whether in the form of cigarette, cigar, beedies or otherwise in public places is illegal, unconstitutional and violative of Article 21 of the Constitution of India; issue a writ in the nature of mandamus or such other writ commanding the respondents to take appropriate and immediate measures to prosecute and punish all persons guilty of smoking in public places treating the said act as satisfying the definition of ‘public nuisance’ as defined under Section 268 of the Indian Penal Code. We heard Mr. P. Deepak, counsel for the petitioners, the Advocate General for the State and counsel for other respondents.

2. In the writ petition originally there were only respondents 1 to 9 viz. State of Kerala, Director of Panchayath, Director General of Police, Commissioners of Police, Thiruvananthapuram, Kochi and Kozhikode and Commissioners of Thiruvananthapuram, Kochi and Kozhikode Municipal Corporations. During the pendency of the Original Petition this court suo-motu impleaded additional respondents 10 to 52 on whom service is complete.

3. Before proceeding to discuss the legal issues arising in this original petition, we feel that it is useful to refer to certain facts and figures of startling revelations which has a direct bearing on the dangers of smoking, active and passive, and its horrifying impact on public health.

### ON SMOKING GENERALLY

4. One million Indians die every year from tobacco-related diseases. This is more than the number of deaths due to motor accidents, AIDS, alcohol and drug abuse put together, say the Indian Medical Association (IMA) and the Indian Academy of Pediatrics (IAP), quoting studies.

5. Cigarette smoking is the major preventable cause of death in America, contributing to an estimated 350000 deaths annually. Epidemiological and experimental evidence has identified cigarette smoking as the primary cause of lung cancer and chronic obstructive pulmonary diseases (COPD) and as a major risk factor for coronary heart disease. Smoking has been associated with other cancers, cerebrovascular and peripheral vascular diseases, and peptic ulcer disease. Smokers also suffer more acute respiratory illness. Cigarette smoke, consisting of particles dispersed in a gas phase, is a complex mixture of thousands of compounds produced by the incomplete combustion of the tobacco leaf. Smoke constituents strongly implicated in causing disease are nicotine and tar in the particulate phase and carbon monoxide in the gas phase. Smokers have a 70 per cent higher mortality rate than nonsmokers. The

risk of dying increases with the amount and duration of smoking and is higher in smokers who inhale. Coronary heart disease is the chief contributor to the excess mortality among cigarette smokers, followed by lung cancer and chronic obstructive pulmonary disease (COPD). Life expectancy is significantly shortened by smoking cigarettes. Tobacco smoke also gets dissolved in the saliva and is swallowed, exposing the upper gastrointestinal tract to carcinogens. A strong association between smoking and lung cancer has been demonstrated in multiple prospective and retrospective epidemiological studies, and corroborated by autopsy evidence. Lung cancer has been the leading cause of cancer death in men since the 1950s, and it surpassed breast cancer as a leading cause of cancer death in women in 1985. Male smokers have a tenfold higher risk of developing lung cancer, and the risk increases with the number of cigarettes smoked. There is also strong evidence that smoking is a major cause of cancers of the larynx, oral cavity and esophagus. The risk of these cancers increases with the intensity of exposure to cigarette smoke either active or passive. Epidemiological studies show an association between smoking and cancers of the bladder, pancreas, stomach, and uterine cervix.

6. Cigarette smoking is a major independent risk factor for coronary artery disease. Retrospective and prospective epidemiological studies have demonstrated a strong relationship between smoking and coronary morbidity and mortality in both men and women. The coronary disease death rate in smokers is 70% higher than in nonsmokers, and the risk increases with the amount of cigarette exposure. The risk of sudden death is two to four times higher in smokers. Smoking is also a risk factor for cardiac arrest and severe malignant arrhythmia's. In addition to increased coronary mortality, smokers have a higher risk of nonfatal myocardial infarction or unstable angina. Patients with angina lower their exercise tolerance if they smoke. Women who smoke and use oral contraceptives or post-menopausal estrogen replacement greatly increase their risk of myocardial infarction.

7. Autopsy studies demonstrate more atheromatous changes in smokes than nonsmokers. Carbon monoxide in cigarette smoke decreases oxygen delivery to endothelial tissues. In addition, smoking may trigger acute ischemia. Carbon monoxide decreases myocardial oxygen supply, while nicotine increases myocardial demand by releasing catecholamines that raise blood pressure, heart rate, and contractility. Carbon monoxide and nicotine also induce platelet aggregation that may cause occlusion of narrowed vessels. Cigarette smoking is the most important risk factor for peripheral vascular disease. In patients with intermittent claudication, smoking lowers exercise tolerance and may shorten graft survival after vascular surgery. Smokers have more aortic atherosclerosis and an increased risk of dying from a ruptured aortic aneurysm. Smokers under the age of 65 have a higher risk of dying from cerebrovascular disease and women who smoke have a greater risk of subarachnoid hemorrhage, especially if they also use oral contraceptives.

### **Smoking and Pulmonary Disease:**

8. Cigarette smoking is the primary cause of chronic bronchitis and emphysema. Smokers have a higher prevalence of respiratory symptoms than nonsmokers. Studies of pulmonary function indicate that impairment exists in asymptomatic as well as symptomatic smokers. Smokers have a higher risk of acute as well as chronic pulmonary disease. Inhaling cigarette smoke impairs pulmonary clearance mechanisms by paralyzing ciliary transport. This may explain the susceptibility to viral respiratory infections, including influenza. Smokers who develop acute respiratory infections have longer and more severe courses, with a more prolonged cough.

### **Other Health Consequences:**

9. Smokers have a higher prevalence of peptic ulcer diseases and a higher case-fatality rate. Smoking has been associated with increased osteoporosis in men and post-menopausal women. Female smokers weigh less than nonsmokers and have an earlier age of menopause; both of these factors are associated with osteoporosis and may contribute to the relationship between smoking and osteoporosis. Moreover, smoking depresses serum estrogen levels in post-menopausal women taking estrogen replacement therapy.

### **ON PASSIVE SMOKING**

#### **Passive Smoking (Environmental Smoke Exposure):**

10. Nonsmokers involuntarily inhale the smoke of nearby smokers, a phenomenon known as passive smoking. Wives, children and friends of smokers are a highly risk-prone group. Inhalation of sidestream smoke by a non-smoker is definitely more harmful to him than to the actual smoker as he inhales more toxins. This is because sidestream smoke contains three times more nicotine, three times more tar and about 50 times more ammonia. Passive smoking (because of smoking by their fathers) could lead to severe complications in babies aged below two. It is pointed out that in India hospital admission rates are 28 per cent higher among the children of smokers. These children have acute lower respiratory infection, decreased lung function, increased eczema and asthma and increased cot deaths. Also, children of heavy smokers tend to be shorter.

11. Passive smoking is associated with an overall 23 per cent increase in the risk of coronary heart disease (CHD) among men and women who had never smoked. The following data shows just how heavy is cigarette smoking's toll on non-smokers. A new "meta-analysis" of data from 14 studies involving 6, 166 individuals with coronary heart disease (CHD) finds that passive smoking was associated with an overall 23 per cent increase in the risk of CHD among men and women who had never smoked. It is estimated that 35,000 to 40,000 non-smokers' deaths each year in the United States can be attributed to

passive smoking. This underscores the need to eliminate passive smoking as an important strategy to reduce the societal burden of CHD. The United Nations health agency insisted that passive smoking caused lung cancer and that an environmental tobacco smoke poses a positive health hazard. Research on the subject has found an estimated 16 per cent increase in the risk of developing lung cancer among nonsmoking spouses of smokers and an estimated 17 per cent rise in risk for work place exposure. The public is left high and dry over the risks of "second-hand smoke.". For non-smokers, the major source of carbon monoxide is from passively inhaled cigarette smoke. Environmental tobacco smoke (ETS) has been shown to reduce lung function in children. Its irritant effect could not be ignored as this is the reason why most people object to being the victims of passive smoking. Patients with asthma find this irritant effect will worsen symptoms. The most remarkable effect of environmental tobacco smoke (ETS) is the development of lung cancer in passively exposed non-smokers as shown by reports from Japan and Greece. Large number of controlled studies have confirmed a relative risk of developing lung cancer in passively exposed subjects. Estimates from the United States have suggested that 3000 to 5000 deaths per year from lung cancer can be attributed to passive smoking.

12. Maternal smoking during pregnancy increases risks to fetus and non-smokers chronically exposed to tobacco smoke will suffer health hazards. Maternal smoking during pregnancy contributes to fetal growth retardation. Infants born to mothers who smoke weigh an average of 200g less but have no shorter gestations than infants of non-smoking mothers. Carbon monoxide in smoke may decrease oxygen availability to the fetus and account for the growth retardation. Smoking during pregnancy has also been linked with higher rates of spontaneous abortion, fetal death, and neonatal death. When smoking occurs in enclosed areas with poor ventilation, such as in buses, bars, and conference rooms, high levels of smoke exposure can occur. Acute exposure to smoke-contaminated air decreased exercise capacity in healthy non-smokers and can worsen symptoms in individuals with angina, chronic obstructive pulmonary disease (COPD) or asthma. Chronic exposure to smoky air occurs in the workplace and in the homes of smokers. Non-smokers in smoky workplaces develop small-airways dysfunction similar to that observed in light smokers. Compared to the children of non-smokers, children whose parents smoke have more respiratory infections throughout childhood, a higher risk of asthma, and alterations in pulmonary function tests. In recent studies of non-smoking women, those married to smokers had higher lung cancer rates than those married to non-smokers. Chronic smoke exposure may be associated with increased incidence of cardiopulmonary disease in nonsmokers.

13. Environmental tobacco smoke (ETS) also contributes to respiratory morbidity of children. Increased platelet aggregation also occurs when a nonsmoker smokes or is passively exposed to smoke.

Although environmental tobacco smoke (ETS) differs from “mainstream smoke” in several ways, it contains many of the same toxic substances. Infants and toddlers may be especially at risk when exposed to environmental tobacco smoke (ETS). Considering the substantial morbidity, and even mortality of acute respiratory illness in childhood, a doubling in risk attributable to passive smoking clearly represents a serious pediatric health problem. Exposure to environmental tobacco smoke (ETS) has been associated with increased asthma-related trips to the emergency room of hospitals. There is now sufficient evidence to conclude that passive smoking is associated with additional episodes and increased severity of asthma in children who already have the disease. Exposure to passive smoking may alter children’s intelligence and behaviour and passive smoke exposure in childhood may be a risk factor for developing lung cancer as an adult. Environmental tobacco smoke (ETS) contains more than 4000 chemicals and at least 40 known carcinogens. Nicotine, the addictive drug contained in tobacco leads to acute increase in heart rate and blood pressure. ETS also increases platelet aggregation, or blood clotting. It also damages the endothelium, the layer of cells that line all blood vessels, including the coronary arteries. In addition, nonsmokers who have high blood pressure or high blood cholesterol are at even greater risk of developing heart diseases from ETS exposure. An investigation in Bristol has found that the children of smokers have high levels of cotinine, a metabolite of nicotine, in their saliva. The results indicated that children who had two smoking parents were breathing in as much nicotine as if they themselves were smoking 80 cigarettes a year. A study published in the “New England Journal of Medicine” found that the children of smoking mothers were less efficient at breathing. A study conducted by the Harvard Medical School in Boston, concluded that passive exposure to maternal cigarette smoke may have important effects on the development of pulmonary function in children. An important discovery is that the cocktail of chemicals in a smoky room may be more lethal than the smoke inhaled by the smoker. The “side stream” smoke contains three times as much benzo(a) pyrene (a virulent cause of cancer) six times as much toluene, another carcinogen, and more than 50 times as much dimethylnitrosamine. It has been commented by Dale Sandler of the National Institute of Environmental Health Studies in the United States that the potential for damage from passive smoking may be greater than has been previously recognised.

14. Thus, it can safely concluded that the dangers of passive smoking are real, broader than once believed and parallel those of direct smoke. It has long been established that smoking harms the health of those who smoke. Now, new epidemiological studies and reviews are strengthening the evidence that it also harms the health of other people nearby who inhale the toxic fumes generated by the smoker, particularly from the burning end of the cigarette. Such indirect, or secondhand, smoking causes death not only by lung cancer but even more by heart attack, the studies show. The studies on passive smoking, as it is often called,

also strengthen the link between parental smoking and respiratory damage in children. According to experts, there was little question that passive smoking is a major health hazard. What has swayed many scientists is a remarkable consistency in findings from different types of studies in several countries with improved methods over those used in the first such studies a few years ago. The new findings confirm and advance the earlier reports from the U.S. Surgeon General, who concluded that passive smoking caused lung cancer. According to Dr. Cedric F. Garland, an expert in the epidemiology of smoking at the University of California at San Diego “the links between passive smoking and health problems are now as solid as any finding in epidemiology.” The newer understanding of the health hazards of passive smoking were underscored in a report at a world conference on lung health in Boston recently. Dr. Stanton A. Glantz of the University of California at San Francisco estimated that passive smoke killed 50000 Americans a year, two-thirds of whom died of heart disease. Passive smoking ranks behind direct smoking and alcohol as the third leading preventable cause of death. Dr. Donald Shopland of the U.S. National Cancer Institute, who has helped to prepare the Surgeon General’s reports on smoking has said: “there’s no question” now that passive smoking is also a cause of heart disease. The new findings on passive smoking parallel recent changes in U.S. laws and rules that limit smoking in public places. In recent years, all but four States (Missouri, North Carolina, Tennessee and Wyoming) have passed comprehensive laws limiting smoking in public place. Only a decade ago many scientists were sceptical about the initial links between passive smoking and lung cancer.

15. “Mainstream smoke” is inhaled and consists of large particles deposited in the larger airways of the lung. “Side stream smoke” is generated from the burning end of cigarettes, cigars and pipes during the smouldering between puffs. It may come from someone else’s tobacco or from one’s own and is the major source of environmental tobacco smoke (ETS). It is a mixture of irritating gasses and carcinogenic tar particles that reach deeper into the lungs because they are small. According to scientists, because of incomplete combustion from the lower temperatures of a smouldering cigarette, sidestream smoke is dirtier and chemically different from mainstream smoke. Scientists have found a 30 per cent increase in risk of death from heart attacks among nonsmokers living with smokers due to passive smoking. Researchers have found that passive smoking makes platelets, the tiny fragments in the blood that help it clot, stickier. Platelets can form clots on plaques in fat-clogged arteries to cause heart attacks and they may also play a role in promoting arteriosclerosis, the underlying cause of most heart attacks. Researchers have also shown that passive smoking affects heart function, decreasing the ability of people with and without heart disease to exercise. It has been pointed out that passive smoking increases the demand on the heart during exercise and reduces the heart’s capacity to speed up. For people with heart disease, the decreased function can precipitate chest pains from angina.

The children exposed to passive smoke since birth, had increased amounts of cholesterol and lower levels of HDL, a protein in blood that is believed to provide protection against heart attacks. The researchers found that the greater the exposure to passive smoke, the greater were the biochemical changes.

16. A pioneering report linking passive smoking and lung cancer came in 1981 from a 14-year Japanese study by Dr. Takeshi Hirayama. His research methods were criticised at first. Mr. Lawrence Garfinkel, an epidemiologist who is vice-president of the American Cancer Society, said that he was at present sceptical of Dr. Hirayama's report but was convinced from later studies, including his own, that there was about a 30 per cent increased risk of developing lung cancer from passive smoking. Mr. Garfinkel said a study of 1.2 million Americans now being completed should help clarify the degree of risk from all types of cancer and other diseases. Dr. Glantz estimated that one-third of the 50,000 deaths from passive smoking were from cancer. In addition to lung cancer, researchers have linked cancer of the cervix to both mainstream and side stream smoke. The American Academy of Paediatrics estimates that 9 million to 12 million American children under the age of 5 may be exposed to passive smoke. The newer studies strengthened earlier conclusions that passive smoke increases the risk of serious early childhood respiratory illness, particularly bronchitis and pneumonia in infancy. Increased coughing was reported from birth to the mid-teenage years among 13 newer studies of passive smoking and respiratory symptoms. It has also been found that passive smoke can lead to middle ear infections and other conditions in children. Asthmatic children are particularly at risk and the lung problems in childhood can extend to adulthood.

17. In 1962 and 1964 the Royal College of Physicians in London and the Surgeon General of the United States released landmark reports documenting the causal relation between smoking and lung cancer. Thereafter, extensive research has confirmed that smoking affects virtually every organ system. By 1990, the Surgeon General of the United States concluded that "smoking represents the most extensively documented cause of disease ever investigated in the history of biomedical research." Studies have shown increased risk of lung cancer in non-smoking women whose husbands smoked. Spousal studies on passive smoking showed a positive association between smoking and lung cancer. It has now been shown that involuntary smoking is a cause of disease, including lung cancer, in healthy non-smokers. Studies in various countries have established a positive association between passive smoking and lung cancer. The Environmental Protection Agency of U.S. classified environmental tobacco smoke (ETS) as a known human carcinogen, to which it attributed 3000 lung cancer deaths annually in American non-smokers. The agency also documented causal associations between exposure to environmental tobacco smoke (ETS) and lower respiratory tract infections such as pneumonia and bronchitis, middle ear disease, and exacerbations of asthma

in children. A report on environmental tobacco smoke (ETS) published in December 1998 by the California Environmental Protection Agency affirmed the findings of the US Environmental Protection Agency on the link between environmental tobacco smoke (ETS) and lung cancer and respiratory illness. It also concluded that passive smoking is a cause of heart disease mortality, acute and chronic heart disease morbidity, retardation of fetal growth, sudden infant death syndrome (SIDS) nasal sinus cancer, and induction of asthma in children. Two important studies from the Wolfson Institute of Preventive Medicine in London, published in 1998 show that marriage to a smoker increased the risk of lung cancer by 26%. Studies have also established strong relation between passive smoking and ischaemic heart disease (IHD). The systematic reviews from the Wolfson Institute, the California Environmental Protection Agency and the US Environmental Protection Agency, and the various reports released make it clear that exposure to environmental tobacco smoke (ETS) is a cause of lung cancer, heart disease and other serious illness. In the United States alone, it is responsible each year for 3000 deaths from lung cancer, 35,000 to 62,000 deaths from ischaemic heart disease (IHD), 150,000 to 300,000 cases of bronchitis or pneumonia in infants and children aged 18 months and younger causing 136 to 212 deaths, 8000 to 26,000 new cases of asthma, exacerbation of asthma in 400,000 to 1 million children, 700,000 to 1.6 million visits to physician offices for middle ear infection. 9700 to 18600 cases of low birth weight, and 1900 to 2700 sudden infant deaths. These figures make passive smoking one of the leading preventable causes of premature death in the United States.

18. Public health action by policy makers to eliminate exposure to environmental tobacco smoke (ETS) is long overdue. A total ban on smoking is preferred on various grounds. Policy makers should pursue all strategies that would help accomplish that goal, including education, legislation, regulation, litigation and enforcement of existing laws.

19. Government of India is a party to 16 or so resolutions adopted by the World Health Organisation since the 1970s, particularly the one adopted in 1986 which urged member-countries to formulate a comprehensive national tobacco control strategy. It was envisaged that the strategy would contain measures (i) to ensure effective protection to non-smokers from involuntary exposure to tobacco smoke; (ii) to promote abstention from the use of tobacco to protect children and young people from becoming addicted; (iii) to ensure that a good example is set on all health-related premises by all health personnel; (iv) to progressively eliminate all incentives which maintain and promote the use of tobacco; (v) to prescribe statutory health warnings on cigarette packets and the containers of all types of tobacco products; (vi) to establish programmes of education and public information on tobacco and health issues with the active involvement of health professionals and media; (vii) to monitor trends in smoking and other

forms of tobacco use, tobacco-related diseases and effectiveness of national smoking control action ; (viii) to promote viable economic alternatives to tobacco production, trade and taxation; and (ix) to establish a national focal point to stimulate, support and coordinate all these activities. Despite the fact that India is a signatory to these resolutions it is saddening to note that no significant follow-up action has been taken, except banning smoking in public places and public transport and printing a statutory warning on cigarette packets. Even here, the action has been half-hearted with the ban on smoking in public places confined to Delhi and a few other cities and the statutory warning being followed more as a ritual and printed in such small letters that the consumer hardly notices it. Advertisement in the government controlled mass media has been prohibited, but it continues unabated in the print media and private television channels. The Government's lip-service is reflected in the absence of any mention about the hazards of tobacco in the Health Ministry's Annual Report. Except on the occasion of the "World No Tobacco Day", once a year, there has been no sustained campaign to counter the promotional campaign of tobacco and highlight the toll tobacco use takes.

20. Every year, 1 million tobacco-related deaths take place in India. An estimated 65 per cent of men use tobacco and in some parts a large proportion of women chew tobacco and bidies. About 33 per cent of all cancers are caused by tobacco. About 50 per cent of all cancers among men and 25 per cent among women are tobacco-related. The number of cases of avoidable tobacco-related cancers of the upper alimentary and respiratory tracts, coronary heart disease and chronic obstructive pulmonary disease (COPD) has been estimated as 2,00,000 every year. Many still-births, low birth infants, and pre-natal mortality have been reported among female chewers.

21. Tobacco kills 50 per cent of its regular users within 40 years. Apart from these direct health implications of tobacco use, the hazards faced by those engaged in the plucking and curing of tobacco leaves have been highlighted by researchers of the Ahmedabad-based National Institute of Occupational Health. The hands of the workers get affected by the chemicals in tobacco and sickness is caused when nicotine gets absorbed into the body through the skin. The symptoms are head-ache, nausea and vomiting. All these well-documented findings are available with the State but if it has not taken any effective action it can only be attributed to the clout which the lethal leaf enjoys in the corridors of power. One of the pet contentions of the protagonists of tobacco is that it makes a significant contribution to the exchequer by way of taxes and hence should not be disturbed. Also a large number of tobacco farmers will be hit if consumption is curbed. Both these have been countered by WHO forcefully. Several studies have brought out that the cost of healthcare of those affected by tobacco-related ailments, which is met from the Government exchequer, is much more than what the Government garners by way of taxes.

Thus, there is a net drain on the government resources. Illness or the premature death of the tobacco-users would cast a heavy economic burden on their families, perpetuating the cycle of poverty. As regards the possible impact of any curb on tobacco use on tobacco farmers, studies by the Rajahmundry-based Tobacco Research Institute of the ICAR have brought out equally remunerative alternatives to tobacco cultivation, besides use of tobacco for purposes other than smoking and chewing.

22. Taking note of the alarming scenario as discussed above, the question then is, what is the relief which this Court can grant to the petitioners? Can this court direct the legislature to enact a law banning tobacco smoking? In our considered opinion the answer can only be an emphatic 'no'. It is entirely for the executive branch of the Government to decide whether or not to introduce any particular legislation..... The Court certainly cannot mandate the executive or any member of the legislature to initiate legislation, howsoever necessary or desirable the Court may consider it to be..... If the executive is not carrying out any duty laid upon it by the Constitution or the law, the Court, can certainly require the executive to carry out such duty and this is precisely what the Court does when it entertains Public Interest Litigation..... But at the same time the Court cannot usurp the functions assigned to the executive and the legislature under the Constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law making activities of the executive and the legislature. Thus, from the above observation of the Supreme Court, it is clear even the Supreme Court found that Himachal Pradesh High Court had exceeded the limits of judicial power in ordering relief in Public Interest Litigation. But then, it has to be borne in mind that this Court acting as the sentinel on the qui vive can certainly interfere and grant relief by way of mandamus to the Government and its officials including police to enforce the existing laws which is quite sufficient to safeguard the interests of the public against the wisp of environmental tobacco smoke (ETS). When laws are there to deal with nuisance the law has to be enforced by the law enforcing agency of the State. The question of discretion of the police in the matter of prosecution of offenders was considered by Lord Denning, saying: "For instance, it is for the Commissioner of Police of the metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were

to issue a directive to his men that no person should be prosecuted for stealing any goods less than 100 pounds in value I should have thought that the court could countermand it. He would be failing in his duty to enforce the law. “ The discretion possessed by the police in enforcing the law was considered by the Court of Appeal in a case in which the applicant complained, merely as a citizen, that the police had adopted a policy of not prosecuting London gaming clubs for illegal forms of gaming. The Commissioner’s substantially bore out the complaint, being based on the uncertainty of the law and the expense and manpower required to keep the clubs under observation. But while the case was pending the law was clarified, fresh instructions were issued, and the Commissioner undertook to withdraw the former instructions. The court therefore found no occasion to intervene. But they made it clear that the Commissioner was not an entirely free agent as his counsel contended. He had a legal duty to the public to enforce the law and the court could intervene by mandamus if, for example, he made it a rule not to prosecute housebreakers. On the other hand the court would not question his discretion when reasonably exercised, eg. In not prosecuting offenders who for some special reason were not blameworthy in the way contemplated by the Act creating the offence. The court criticised the police policy of suspending observation of gaming clubs, as being clearly contrary to Parliament’s intentions; and had it not been changed, they would have been disposed to intervene. In 1972 the same public-spirited citizen brought similar proceedings, asking the court to order the public to take more effective action to enforce the law against the publication and sale of pornography. The Metropolitan Police were given instructions not to institute prosecutions or apply for destruction orders without the approval of the Director of PUBLIC Prosecutions; and it was shown that much pornographic literature was flagrantly offered for sale without interference by the police. The Court of Appeal found that the efforts of the police had been largely ineffective, but that the real cause of the trouble was the feebleness of the Obscene Publications Act 1959. Accordingly it could not be said that the police were failing in their duty, and an order of mandamus was refused. It was again made clear that if the police were carrying out their duty to enforce the law, the court would not interfere with their discretion; but that the court would do so in the extreme case where it was shown that they were neglecting their duty. Exactly, that is the factual situation here.

23. The existing law on the subject is embodied in Sections 268 and 278 IPC, Rule 227(1)(d) and 227(5) 22(a) of the Kerala Motor Vehicles Rules 1989 besides the relevant provisions of Cr.P.C. Section 268 IPC defines public nuisance.

Section 268:-

“Public nuisance — A person is guilty of a public nuisance who does any act or is guilty of an illegal

omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage.”

There can be no doubt that smoking in a public place will vitiate the atmosphere so as to make it noxious to the health of persons who happened to be there. Therefore, smoking in a public place is an offence punishable under Section 278 IPC. The punishment for the offence is fine which may extend to Rs.500/- as prescribed under Section 278 IPC. Section 278:]

“Making atmosphere noxious to health.— Whoever voluntarily vitiates the atmospheres in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees.”

In schedule I of Cr.P.C. offence under Section 278 IPC is a non-cognizable offence. Since the offence alleged is non-cognizable the police has no authority to arrest the offender without an order from a Magistrate or without a warrant. But, since the complaint includes the report of a police officer in a non-cognizable case, the police can file a complaint before the Magistrate against the offender for the said offence. Since the offence is punishable with fine upto Rs.500/- only, the case comes within the definition of a ‘petty case’ as per Section 206(2) Cr.P.C. However, it is no necessary that the offence complained of is cognizable to enable the police to file a complaint. A reading of Section 153(2) Cr.P.C. shows that the police can file a complaint to the Magistrate in a non-cognizable case. When the complaint is made by a public servant in discharge of his official duty the Magistrate need not follow the procedure under Sections 200 and 202 Cr.P.C. in which case the Magistrate can straight away issue process to the accused. That apart, if any person who commits the offence refuses to give his name and address, a police officer can arrest him for the purpose of ascertaining his address. Since smoking is a public nuisance, it can be more effectively abated by invoking Section 133 Cr.P.C. Section 133 Cr.P.C.

“Conditional order for removal of nuisance —(1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers—

that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

that any dangerous animal should be destroyed confined or otherwise disposed of,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order —

to remove such obstruction or nuisance; or

to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

to prevent or stop the construction of such building, or to alter the disposal of such substance; or

to remove, repair, or support such building, tent or structure, or to remove or support such trees; or

to fence such tank, well or excavation; or to destroy, confine or dispose of such dangerous animal in the manner provided in the said over;

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation.—A “public place” includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.”

If such an order is passed by the Executive Magistrate any person who disobeys the order is guilty of the offence punishable under section 188 IPC. Section 188:

“Disobedience to order duly promulgated by public servant.—Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both;

and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.”

Explanation.—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm.”

Offence under Section 188 IPC is cognizable as per first schedule of Cr.P.C. Therefore, after the promulgation of an order under Section 133(a) Cr.P.C., if any person is found smoking in a public place, the police can arrest him without a warrant. The only condition is that the order is duly promulgated by the Executive Magistrates. The Executive Magistrates have a duty to promulgate such an order.

24. In Ratlam Municipality vs. Vardhichand, Krishna Iyer, J. Speaking for the Bench ruled that the imperative tone of Section 133 Cr.P.C. read with the punitive temper of Section 188 IPC make the prohibitory act a mandatory duty. If a complaint is filed under Section 188 IPC, there is an embargo for the Magistrate to take cognizance under Section 195(1) Cr.P.C. as cognizance can be taken for the offence on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. This embargo will disappear if there is a complaint in writing by the public servant concerned. When there existed a public nuisance this Court could require the executive under Section 133 Cr.P.C. to abate the nuisance by taking affirmative action on a timebound basis. Otherwise, it will pave the way for a

profligate statutory body or pachydermic governmental agency to defy the law by wilful inaction. Section 133 Cr.P.C. is categoric although reads discretionary. Judicial discretion when facts for its exercise are present, has a mandatory import. Therefore, when the MAGISTRATE HAS, BEFORE HIM ALL THE INFORMATION AND EVIDENCE, WHICH DISCLOSE THE EXISTENCE OF A PUBLIC NUISANCE AND, ON THE MATERIALS PLACED, HE CONSIDERS THAT SUCH NUISANCE SHOULD BE REMOVED FROM ANY PUBLIC PLACE WHICH MAY BE LAWFULLY USED BY THE PUBLIC, HE SHALL ACT. Thus, his judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance, triggered by the jurisdictional facts. The responsibility of the Magistrate under Section 133 Cr.P.C. is to order removal of such nuisance within a time to be fixed in the order. This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceeding. Failure to comply with the direction will be visited with a punishment contemplated by section 188 IPC. The new social justice orientation imparted by the Constitution of India makes Section 133 Cr.P.C. a remedial weapon of verstaile use. Social justice is due to the people and, therefore, the people must be able to trigger off the jurisdiction vested for their benefit in any public functionary like a Magistrate under Section 133 Cr.P.C. In the exercise of such power, the judiciary must be informed by the broader principle of access to justice necessitated by the conditions of developing countries and obligated by the mandate contained in Article 21, Article 38 and Article 51(a) of the Constitution of India. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The word 'life' in this Article is very significant as it covers every facet of human existence. 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. Life does not merely cannot a continued drugery through life. The expression 'life' has a much wider meaning bringing within its sweep some of the finer graces of human civilisation which makes life worth living. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. The amplitude of the word 'life' is so wide that the danger and encroachment complained of would impinge upon the fundamental rights of citizens as in the present case. The apex court has interpreted Article 21 giving wide meaning to 'life' which includes the quality of life, adequate nutrition, clothing and shelter and cannot be restricted merely to physical existence. The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to the expression 'life' to enable a man not only to sustain life but to enjoy it in a full measure. The sweep of right to life conferred by Article 21 of the Constitution is wide and far-reaching so as to bring within its scope the right to pollution free air and the "right to decent environment." Under our Constitutional

set up the dignity of man and subject to law the privacy of hom shall be inviolable. The Constitution through various Articles in Part III and Part IV guarantees the dignity of the individual and also right to life which if permitted to trample upon will result in negation of these rights and dignity of human personality.

25. For the purpose of the present controversy, suffice it to say, that a person is entitled to protection of law from being exposed to hazards of passive smoking. Under the common law a person whose right of easement, property or health is adversely affected by any act or omission of a third person in the neighbourhood or at a far off place is entitled to seek an injunction and also claim damages, but the constitutional rights stand at a higher pedestal than the legal rights conferred by law be it the municipal law or the common law. Such a danger as depicted in the earlier paragraphs of this judgment is bound to affect lakhs of people who may suffer from it unknowingly because of lack of awareness, information and education and also because such sufferance is silent and fatal and most of the people who are exposed to the leathal smoke do not know that they are in fact facing any risk or are likely to suffer by such risk. Because of lapses on the part of the authorities concerned in creating awareness of the dangers of passive smoking innocent people are unwittingly made to inhale noxious environmental tobacco smoke (ETS) and consequently became victims of various deadly diseases. It is therefore time that the authorities should wake up before the matter slips out of their hands since health of large number of people is at stake. Maintenance of health and environment falls within the purview of Article 21 of the Constitution as it adversely affects the life of the citizens by slow and insidious poisoning thereby reducing the very life span itself. Exposing unsuspecting individuals to environmental tobacco smoke (ETS) with ominous consequences amounts to taking away their life, not by execution of death sentence but by a slow and gradual process by robbing him of all his qualities and graces, a process which is much more cruel than sending a man to gallows. The convert human existence into animal existence no doubt amounts to taking away human life, because a man lives not by his physical existence or by bread alone but by his human existence. Smokers dig not only their own graves prematurely but also pose a serious threat to the lives of lakhs of innocent nonsmokers who get themselves exposed to ETS thereby violating their right to life guaranteed under Article 21 of the Constitution of India. A healthy body is the very foundation for all human activities. In a welfare State it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health.

In the result, we declare and hold as follows:

Public smoking of tobacco in any form whether in the form of cigarettes, cigars, beedies or otherwise is illegal, unconstitutional and violative of Article 21 of the Constitution of India. We direct the District Collectors of



all the Districts of the State of Kerala who are suo-motu impleaded as Additional respondents 39 to 52 to promulgate an order under Section 133(a) Cr.P.C. Prohibiting public smoking within one month from today and direct the 3<sup>rd</sup> respondent Director General of Public, Thiruvananthapuram, to issue instructions to his subordinates to take appropriate and immediate measures to prosecute all persons found smoking in public places treating the said act as satisfying the definition of “public nuisance” as defined under Section 268 IPC in the manner indicated in this Judgement by filing a complaint before the competent Magistrate and direct all other respondents to take appropriate action by way of display of ‘Smoking Prohibited’ boards etc. in their respective offices or campuses.

There will be a further direction to Addl. Respondents 39 to 52 to issue appropriate directions to the respective R.T.Os to strictly enforce the provisions contained in Rule 227(1)(d) and 227(5) of the Kerala Motor Vehicles Rules, 1989.

Tobacco smoking in public places falls within the mischief of the penal provisions relating to “public nuisance” as contained in the Indian Penal Code and also the definition of air pollution as contained in the statutes dealing with the protection and preservation of the environment, in particular the Air (Prevention and Control of Pollution) Act, 1981.

The respondents, repositories of wide statutory powers and enjoined by the statute and Rules to enforce the penal provisions therein are duty bound to require that the invidious practice of smoking in public places, a positive nuisance, is discouraged and offenders visited with prosecution and penalty as mandated by law. Accordingly, the respondents are liable to be compelled by positive directions from this Court to act and take measures to abate the nuisance of public smoking in accordance with law. Directions in the above lines are hereby issued.

The continued omission and inaction on the part of the respondents to comply with the constitutional mandate to protect life and to recognise the inviolability of dignity of man and their refusal to countenance the baneful consequences of smoking on the public at large has resulted in extreme hardship and injury to the citizens and amounts to a negation of their constitutional guarantee of decent living as provided under Art.21 of the Constitution of India.

26(a) Media, print and electronic will take note of this judgment and caution the public about penal consequences of violation of the ban on public smoking.

27. The petitioners are free to move this Court for further directions as and when deemed necessary. The Original Petition is allowed as above.

Sd/- (AR. Lakshmanan, Ag.C.J.) Sd/- (K. Narayana Kurup, Judge.) 12<sup>th</sup> July, 1999. // True copy // Sd/- Examiner.

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**Key words: sustainable development, precautionary principle, polluter pays principle, tanneries.  
V.C.W.F. vs U.O.I. (Kuldip Singh, J.)**

**VELLORE CITIZENS WELFARE FORUM, *Petitioner* vs. UNION OF INDIA & ORS., *Respondents***

**CORAM: KULDIP SINGH, FAIZAN UDDIN AND K. VENKATASWAMI, JJ.**

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PUBLIC INTEREST LITIGATION — ENVIRONMENT — TANNERIES IN STATE OF TAMIL NADU — Court, after tracing the history of the litigation, legal provisions and after going through the various reports, gave directions to the Central Government for constituting an authority under the Environment Protection Act conferring all the necessary powers to deal with the situation created by the tanneries and other polluting industries in the State of Tamil Nadu and issued various other directions regarding the functions to be performed by the said authority. The said directions are contained in Paras 25 and 26 of the judgment.

Referred: *Indian Council for Enviro - Legal Action vs Union of India, 1996(2) SCALE 44; Addl. District Magistrate, Jabalpur vs Shivakant Shukla, AIR 1976 SC 1207.*

Kuldip Singh, J. — This petition - public interest - under Article 32 of the Constitution of India has been filed by Vellore Citizens Welfare Forum and is directed against the pollution which is being caused by enormous discharge of untreated effluent by the tanneries and other-industries in the State of Tamil Nadu. It is stated that the tanneries are discharging untreated effluent into agricultural fields, roadsides, water-ways and open lands. The untreated effluent is finally discharged in river Palar which is the main source of water supply to the residents of the area. According to the petitioner the entire surface and sub-soil water of river Palar has been polluted resulting in non availability of potable water to the residents of the area. It is stated that the tanneries in the State of Tamil Nadu have caused environmental degradation in the area. According to the preliminary survey made by the Tamil Nadu Agricultural University Research Centre Vellore nearly 35,000 hectares of agricultural land in the Tanneries Belt, has become either partially or totally unfit for cultivation. It has been further stated in the petition that the tanneries use about 170 types of chemicals in the chrome tanning processes. The said chemicals include sodium chloride, lime, sodium sulphate, chlorium sulphate, fat liquor Amonia and sulphuric acid besides dyes which are used in large quantities. Nearly 35 litres of water is used for processing one kilogram of finished leather, resulting in dangerously enormous quantities of toxic effluents being let out in the open by the tanning industry. These effluents have spoiled the physico-chemical properties of the soil, and have contaminated ground water by percolation. According to the petitioner an independent survey conducted by Peace Members, a non-governmental organisation, covering 13 villages of Dindigal and Peddiar Chatram Anchayat Unions, reveals that 350 wells out of total of 467 used for drinking and irrigation purposes have been polluted. Women and children have to walk miles to get drinking water. Legal Aid and Advice Board of Tamil Nadu requested two lawyers namely, M.R. Ramanan and P.S. Subramaniam to visit the area and submit a report indicating the extent of pollution caused by the tanneries. Relevant part of the report is as under:-

“As per the Technical Report dated 28.5.1983 of the Hydrological Investigations carried out in Solur village near Ambur it was noticed that 176 chemicals including acids were contained in the Tannery effluents. If 40 litres of water with chemicals are required for one Kilo of Leather, with the production of 200 tons of Leather per day at present and likely to be increased manifold in the next four to five years with the springing up of more tanneries like mushroom in and around Ambur Town, the magnitude of the effluent water used with chemicals and acids let out daily can be shockingly imagined. .... The effluents are let out from the tanneries in the nearby lands, then to Goodar and Palar rivers. The lands, the rivulet and the river receive the effluents containing toxic chemicals and acids. The sub soil water is polluted ultimately affecting not only arable lands, wells used for agriculture but also drinking water wells. The entire Ambur Town and the villages situated nearby do not have good drinking water. Some of the influential and rich people are able to get drinking water from a far off place connected by a few pipes. During rainy days and floods, the chemicals deposited into the rivers and lands spread out quickly to other lands. The effluents thus let out, affect cultivation, either crops do not come up at all or if produced the yield is reduced abnormally too low. .... The Tanners have come to stay. The industry is a Foreign Exchange Earner. But one moot point is whether at the cost of the lives of lakhs of people with increasing human population the activities of the tanneries should be encouraged on monetary considerations. We find that the tanners have absolutely no regard for the healthy environment in and around their tanneries. The effluents discharged have been stored like a pond openly in the most of the places adjacent to cultivable lands with easy access for the animals and the people. The Ambur Municipality, which can exercise its powers as per the provisions of the Madras District Municipalities Act (1920) more particularly under Sections 226 to 231, 249 to 253 and 338 to 342 seems to be a silent spectator probably it does not want to antagonise the highly influential and stupendously rich tanners. The powers given under Section 63 of the Water Prevention and Control of Pollution Act 1974 (6 of 1974) have not been exercised in the case of tanneries in Ambur and the surrounding areas.”

2. Alongwith the affidavit dated July 21, 1992 filed by Deputy Secretary to Government, Environment and Forests Department of Tamil Nadu, a list of villages affected by the tanneries has been attached. The list mentions 59 villages in the three Divisions of Thirupathur, Vellore and Ranipath. There is acute shortage of drinking water in these 59 villages and as such alternative arrangements were being made by the Government for the supply of drinking water.

3. In the affidavit dated January 9, 1992 filed by Member Secretary, Tamil Nadu Pollution Control Board (the Board), it has been stated as under:-

“It is submitted that there are 584 tanneries in North Arcot Ambedkar District vide annexure ‘A’ and ‘D’. Out of which 443 Tanneries have applied for consent of the Board. The Government were concerned with the treatment and disposal of effluent from tanneries. The Government gave time upto 31.7.1985 to tanneries to put up Effluent Treatment Plant (E.T.P.) So far 33 tanneries in North Arcot ambedkar District have put up Effluent Treatment Plant. The Board has stipulated standards for the effluent to be disposed by the tanneries.”

4. The affidavits filed on behalf of State of Tamil Nadu and the Board clearly indicate that the tanneries and other polluting industries in the State of Tamil Nadu are being persuaded for the last about 10 years to control the pollution generated by them. They were given option either to construct common effluent treatment plants for a cluster of industries or to set up individual pollution control devices. The Central Government agreed to give substantial subsidy for the construction of common effluent treatment plants (CETPS). It is a pity that till date most of the tanneries operating in the State of Tamil Nadu have not taken any step to control the pollution caused by the discharge of effluent. This Court on May 1, 1995 passed a detailed order. In the said order this Court noticed various earlier orders passed by this Court and finally directed as under:

“Mr. R. Mohan, learned senior counsel for the Tamil Nadu Pollution Control Board has placed before us a consolidated statement dividing the 553 industries into three parts. The first part in Statement No. 1 and the second part in Statement No. 2 relate to those tanneries who have set up the Effluent Treatment Plants either individually or collectively to the satisfaction of the Tamil Nadu Pollution Control Board. According to the report placed on the record by the Board, these industries in Statement 1 and 2 have not achieved the standard or have not started functioning to the satisfaction of the Board. So far as the industries in Statements 1 and 2 are concerned, we give them three months notice from today to complete the setting up of Effluent Treatment Plant (either individually or collectively) failing which they shall be liable to pollution fine on the basis of their past working and also liable to be closed. We direct the Tamil Nadu Pollution Control Board to issue individual notices to all these industries within two weeks from today. The Board is also directed to issue a general notice on three consecutive days in a local newspaper which has circulation in the District concerned. So far as the 57 tanneries listed in Statement III (including 12 industries who have filed writ petition, Nos. of which have been given above) are concerned, these units have not installed and commissioned the Effluent Treatment Plants despite various orders issued by this Court from time to time. Mr. R. Mohan, learned senior counsel appearing for Tamil Nadu Pollution Control Board states that the Board has issued separate notices to these units directing them to set up the Effluent Treatment Plants. Keeping in view the fact that

this Court has been monitoring the matter for the last about four years and various orders have been issued by this Court from time to time, there is no justification to grant any further time to these industries. We, therefore, direct the 57 industries listed hereunder to be closed with immediate effect. .... We direct the District Collector and the Senior Superintendent of Police of the district to have our orders complied with immediately. Both these Officers shall file a report in this Court within one week of the receipt of the order.

We give opportunity to these 57 industries to approach this Court as and when any steps towards the setting up of Effluent Treatment Plants and their commissioning have been taken by these industries. If any of the industries wish to be re-located to some other area, they may come out with a proposal in that respect.”

5. On July 28, 1995 this Court suspended the closure order in respect of seven industries mentioned therein for a period of eight weeks. It was further observed as under:-

“Mr. G. Ramaswamy, learned senior advocate appearing for some of the tanneries in Madras states that the setting up of the effluent treatment plants is progressing satisfactorily. According to him several lacs have already been spent and in a short time it would start operating. Mr. Mohan, learned counsel for the Tamil Nadu Pollution Control Board, states that the team of the Board will inspect the project and file a report by 3rd August, 1995”.

6. This Court on September 8, 1995 passed the following order:-

“The Tamil Nadu Pollution Control Board has filed its report. List No. I relates to about 299 industries. It is stated by Mr. G. Ramaswamy, Mr. Kapil Sibal and Mr.G.L. Sanghi, learned senior advocates appearing for these industries, that the setting up of the projects is in progress. According to the learned counsel Tamil Nadu Leather Development Corporation (TALCO) is in charge of the project. The learned counsel state that the project shall be completed in every respect within 3 months from today. The details of these industries and the projects undertaken by TALCO as per list No. I is as under. .... We are of the view that it would be in the interest of justice to give a little more time to these industries to complete the project. Although the industries have asked time for three months, we give them time till 31st December, 1995. We make it clear that in case the projects are not completed by that time, the industries shall be liable to be closed forthwith. Apart from that, these industries shall also be liable to pollution fine for the past period during which they had been operating.

We also take this opportunity to direct TALCO to take full interest in these projects and have the projects completed within the time granted by us.

Mr. Kapil Sibal, learned counsel appearing for the tanneries, stated that Council for Indian finished Leather Manufacturers Export Association is a body which is collecting 5% on all exports. This body also helps the tanneries in various respect. We issue notice to the Association to be present in this Court and assist this Court in all the matters pertaining to the leather tanneries in Madras. Mr. Sampath takes notice.

So far as List No. II is concerned, it relates to about 163 tanneries (Except M/s. Vibgyor Tanners & Co., Kailasagiri Road, Mittalam-635 811, Ambur (via). The Pollution Control Board has inspected all these tanneries and placed its report before us. According to the report most of these tanneries have not even started primary work at the spot. Some of them have not even located the land. The tanneries should have themselves set up the pollution control devices right at the time when they started working. They have not done so. They are not even listening to various orders passed by this Court from time to time during the last more than 2 years. It is on the record that these tanneries are polluting the area. Even the water around the area where they are operating is not worth drinking. We give no further time to these tanneries. We direct all the following tanneries which are numbering about 162 to be closed with immediate effect.

It may be mentioned that this Court suspended the closure orders in respect of various industries from time to time enable the said industries to instal the pollution control devices.

7. This Court by the order dated October 20, 1995 directed the National Environmental Engineering Research Institute, Nagpur (NEERI) to send a team of experts to examine, in particular, the feasibility of setting up of CETPS for cluster of tanneries situated at different places in the State of Tamil Nadu where the work of setting up for the CETPs including those where construction work was in progress. NEERI submitted its first report on December 9, 1995 and the second report on February 12, 1996. This Court examined the two reports and passed the following order on April 9, 1996:-

“Pursuant to this Court’s order dated December 15, 1995, NEERI has submitted Final Examination Report dated February 12, 1996, regarding CETPs constructed/under construction by the Tanneries in Tamil Nadu A four member team constituted by the Director, NEERI inspected the CETPs from January 27 to February 12, 1996. According to the report, at present, 30 CETPs sites have been identified for tannery clusters in the five districts of Tamil Nadu viz., North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. All the 30 CETPs were inspected by the Team. According to the report, only 7 CETPs are under operation, while 10 are under construction and 13 are proposed. The following 7 ETPs are under operation:

1. M/s. TALCO Ranipet Tannery Effluent Treatment Co. Ltd. Ranipet, Dist. North Arcot Ambedkar.
2. M/s. TALCO Ambur Tannery Effluent Treatment Co. Ltd., Thuthipet Sector, Ambur Dist. North Arcot Ambedkar.
3. M/s. TALCO Vaniyambadi Tanners Enviro Control Systems Ltd., Vaniyambattu, Vaniyambadi, Dt. North Arcot.
4. M/s. Pallavarm Tanners Industrial Effluent Treatment Co., Chrompet Area, Dist. Chengai MGR.
5. M/s. Ranipet SIDCO Finished Leather Effluent Treatment Co. Pvt. Ltd., Ranipet, Dist. North Arcot Ambedkar.
6. M/s. TALCO Vaniyambadi Tanners Enviro Control System s Ltd., Udayendiram, Vaniyambadi, Dist. North Arcot Ambedkar.
7. M/s. TALCO Pernambut Tannery Effluent Treatment Co. Ltd., Bakkalapalli, Pernambut, Dist. North Arcot Ambedkar.

The CETPs mentioned at S1.Nos.5, 6 & 7 were commissioned in January, 1996 and were on the date of report passing through stabilization period. The report indicates that so far as the above CETPs are concerned, although there is improvement in the performance, they are still not operating at their optimal level and are not meeting the standards as laid down by the Ministry of Environment and Forests and the Tamil Nadu Pollution Control Board for inland surface water discharge. The NEERI has given various recommendations to be followed by the above mentioned units. We direct the units to comply with the recommendations of NEERI within two months from today. The Tamil Nadu Pollution Control Board shall monitor the directions and have the recommendations of the NEERI complied with. So far as the three units which are under stabilization, the NEERI Team may inspect the same and place a final report before this Court within the period of two months.

Apart from the tanneries which are connected with the above mentioned 7 units, there are large number of other tanneries operating in the 5 districts mentioned above which have not set up any satisfactory pollution control devices. Mr. Mohan, learned counsel for the Tamil Nadu Pollution Control Board states that notices were issued to all those tanneries from time to time directing them to set up the necessary pollution control devices. It is mandatory for the tanneries to set up the pollution control devices. Despite notices it has not been done. This Court has been monitoring these matters for the last about 4 years. There is no awakening or realisation to control the pollution which is being generated by these tanneries.

The NEERI has indicated the physico-chemical characteristics of ground water from dug wells near tannery clusters. According to the report, water samples show that well-waters around the tanneries are unfit for drinking. The report also

shows that the quality of water in Palar river down stream from the place where effluent is discharged, is highly polluted. We, therefore, direct that all the tanneries in the districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. which are not connected with the seven CETPs mentioned above, shall be closed with immediate effect. None of these tanneries shall be permitted to operate till the time the CETPs are constructed to the satisfaction of the Tamil Nadu Pollution control Board. We direct the District Magistrate and the Superintendent of Police of the area concerned, to have all these tanneries closed with immediate effect. Mr. Mehta has placed on record the report of Tamil Nadu Pollution Control Board. In Statement I of the Index, there is a list of 30 industries which have also not been connected with any CETPs. According to the report, these industries have not, till date set up pollution control devices. We direct the closure of these industries also. List is as under ..... The Tamil Nadu Pollution Control Board has filed another report dated January 18, 1996 pertaining to 51 Tanneries. There is dispute regarding the permissible limit of the quantity of total dissolved solids (TDS). Since the NEERI team is visiting these tanneries, they may examine the TDS aspect also and advise this Court accordingly. Meanwhile, we do not propose to close any of the tannery on the ground that it is discharging more than 2001 TDS.

The report indicates that except the 17 units, all other units are non-compliant units in the sense that they are not complying with the BOD standards. Excepting these 17 industries, the remaining 34 tanneries listed hereunder are directed to be closed forthwith. .... We direct the District Magistrate and the Superintendent of the Police of the area concerned to have all these industries mentioned above closed forthwith. The tanneries in the 5 districts of Tamil Nadu referred to in this order have been operating for a long time. Some of the tanneries are operating for a period of more than two decades. All this period, these tanneries have been polluting the area. Needless to say that the total environment in the area has been polluted. We issue show cause notice to these industries through their learned counsel who are present in Court, why they be not subjected to heavy pollution fine. We direct the State of Tamil Nadu through the Industry Ministry, the Tamil Nadu Pollution Control Board and all other authorities concerned and also the Government of India through the Ministry of Environment and Forests, not to permit the setting up of further tanneries in the State of Tamil Nadu. Copy of this order to be communicated to the concerned authorities within three days. To come up for further consideration after the replies to the show cause. There are large number of tanneries in the State of Tamil Nadu which have set up individual pollution control devices and which according to the Tamil Nadu Pollution Control Board, are operating satisfactorily. The fact, however, remains that all these tanneries are discharging the treated effluents within the factory

precinct itself. We direct NEERI Team which is visiting this area to find out as to whether the discharge of the effluent on the land within the factory premises is permissible environmentally. *M/s. Nandeem Tanning Company, Valayampet Vaniyambadi* is one of such industries. Copy of the report submitted by the Tamil Nadu Pollution Control Board be forwarded to the NEERI. NEERI may inspect this industry within ten days and file a report in this Court. Copy of this order be communicated to NEERI.

*Matters regarding Distilleries in the State of Tamil Nadu.*

The Tamil Nadu Pollution Control Board has placed on record the factual report regarding 6 Distilleries mentioned in page 4 of the Index of its Report dated April 5, 1996. Learned counsel for the Board states that the Board shall issue necessary notices to these industries to set up pollution control devices to the satisfaction of the Board, failing which these distilleries shall be closed. The Pollution Control Board shall place a status report before this Court.”

The NEERI submitted two further reports on May 1, 1996 and June 11, 1996 in respect of CETPs set up by various industries. The NEERI reports indicate that the physico-chemical characteristics of ground water from dug wells in Ranipath, Thuthipath, Valayambattu, Vaniyambadi and various other places do not conform to the limits prescribed for drinking purposes.

8. This Court has been monitoring this petition for almost five years. The NEERI, Board and the Central Pollution Control Board (Central Board) have visited the tanning and other industries in the State of Tamil Nadu for several times. These expert bodies have offered all possible assistance to these industries. The NEERI reports indicate that even the seven operational CETPs are not functioning to its satisfaction. NEERI has made several recommendations to be followed by the operational CETPs. Out of the 30 CETP-sites which have been identified for tannery clusters in the five districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Thrichi and Chengai MGR. 9 are under operation 10 are under construction and 13 are proposed. There are large number of tanneries which are not likely to be connected with any CETP and are required to set up pollution control devices on their own. Despite repeated extensions granted by this Court during the last five years and prior to that by the Board the tanneries in the State of Tamil Nadu have miserably failed to control the pollution generated by them.

9. It is no doubt correct that the leather industry in India has become a major foreign exchange earner and at present Tamil Nadu is the leading exporter of finished leather accounting for approximately 80% of the country's export. Though the leather industry is of vital importance to the country as it generates foreign exchange and provides employment avenues it has no right to destroy the ecology,

degrade the environment and pose as a health-hazard. It cannot be permitted to expand or even to continue with the present production unless it tackles by itself the problem of pollution created by the said industry.

10. The traditional concept that development and ecology are opposed to each other, is no longer acceptable. “Sustainable Development” is the answer. In the International sphere “Sustainable Development” as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on environment and Development in its report called “Our Common Future”. The Commission was chaired by the then Prime Minister of Norway Ms. G.H. “Brundtland and as such is popularly known as “Brundtland Report”. In 1991 the World Conservation Union, United Nations Environment Programme and World Wide Fund for Nature, jointly came out with a document called “Caring for the Earth” which is a strategy for sustainable living. Finally, came the Earth Summit held in June, 1992 at Rio which saw the largest gathering of world leaders ever in the history - deliberating and chalking out a blue print for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two conventions, one on biological diversity and another on climate change. These conventions were signed by 153 nations. The delegates also approved by consensus three non binding documents namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution. During the two decades from Stockholm to Rio “Sustainable Development” has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting eco-systems. “Sustainable Development” as defined by the Brundtland Report means “Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs”. We have no hesitation in holding that “Sustainable Development” as a balancing concept between ecology and development has been accepted as a part of the Customary International Law though its salient features have yet to be finalised by the International Law Jurists.

11. Some of the salient principles of “Sustainable Development”, as culled-out from Brundtland Report and other international documents, are Inter-Generational Equity, Use and Conservation of Natural Resources, Environmental Protection, the Precautionary Principle, Polluter Pays principle, Obligation to assist and cooperate, Eradication of Poverty and Financial Assistance to the developing countries. We are, however, of the view that “The Precautionary Principle” and “The Polluter Pays” principle are essential features of “Sustainable Development”. The “Precautionary Principle” - in the context of the municipal law - means:

- (i) Environmental measures - by the State Government and the statutory authorities - must anticipate, prevent and attack the causes of environmental degradation.
- (ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
- (iii) The “Onus of proof” is on the actor or the developer/ industrialist to show that his action is environmentally benign.

12. “The Polluter Pays” principle has been held to be a sound principle by this Court in *Indian Council for Enviro - Legal Action vs. Union of India* J.T. 1996 (2) 196. The Court observed, “We are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country”. The Court ruled that “Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on his activity. The rule is premised upon the very nature of the activity carried on”. Consequently the polluting industries are “Absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas”. The “Polluter Pays” principle as interpreted by this Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of “Sustainable Development” and as such polluter is liable to pay the cost to the individual suffers as well as the cost of reversing the damaged ecology.

13. The precautionary principle and the polluter pays principle have been accepted as part of the law of the land. Article 21 of the Constitution of India guarantees protection of life and person liberty. Articles 47, 48A and 51A(g) of the Constitution are as under:

“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 purposes of intoxicating drinks and of drugs which are injurious to health.

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.

51A(g). To protect and improve the natural

environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures.”

Apart from the constitutional mandate to protect and improve the environment there are plenty of post independence legislations on the subject but more relevant enactments for our purpose are: The Water (Prevention and Control of Pollution) Act, 1974 (the Water Act), The Air (Prevention and Control of Pollution) Act, 1981 (the Air Act) and the Environment Protection Act 1986 (the Environment Act). The Water Act provides for the constitution of the Central Pollution Control Board by the Central Government and the constitution of the State Pollution Control Boards by various State Governments in the country. The Boards function under the control of the Governments concerned. The Water Act prohibits the use of streams and wells for disposal of polluting matters. Also provides for restrictions on outlets and discharge of effluents without obtaining consent from the Board. Prosecution and penalties have been provided which include sentence of imprisonment. The Air Act provides that the Central Pollution Control Board and the State Pollution Control Boards constituted under the Water Act shall also perform the powers and functions under the Air Act. The main function of the Boards, under the Air Act, is to improve the quality of the air and to prevent, control and abate air pollution in the country. We shall deal with the Environment Act in the later part of this judgment.

14. In view of the above mentioned constitutional and statutory provisions we have no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environmental law of the country.

15. Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law. To support we may refer to Justice H.R. Khanna's opinion in *Adl. Distt. Magistrate Jabalpur vs. Shivakant Syukla* (AIR 1976 SC 1207) *Jolly George Varghese's* case (AIR 1980 SC 470) and *Gramophone Company's* case (AIR 1984 SC 667).

16. The Constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution free environment, but the source of the right is the inalienable common law right of clean environment. It would be useful to quote a paragraph from Blackstone's commentaries on the Laws of England (Commentaries on the Laws of England of Sir Willian Blackstone) Vol. III, fourth edition published in 1876. Chapter XIII, "Of Nuisance" depicts the law on the subject in the following words:

“Also, if a person keeps his hogs, or other noisome animals, 'or allows filth to accumulate on his

premises, so near the house of another, that the stench incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. A like injury is, of one's neighbour sets up and exercises any offensive trade; as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they would be exercised in remote places; for the rule is, sic utere "tuo, ut alienum non laedas;" this therefore is an actionable nuisance. 'And on a similar principle a constant ringing of bells in one's immediate neighbourhood may be a nuisance..... With regard to other corporeal heriditaments; it is a nuisance to stop or divert water that used to run to another's meadow or mill; to corrupt or poison a water-course, by erecting a dye-house or a lime-pit, for the use of trade, in the upper part of the stream; 'to pollute a pond, from which another is entitled to water his cattle; to obstruct a drain; or in short to do any act in common property, that in its consequences must necessarily tend to the prejudice of one's neighbour. So closely does the law of England enforce that excellent rule of gospel-morality, of "doing. to others, as we would they should do unto ourselves.”

17. Our legal system having been founded on the British Common Law the right of a person to pollution free environment is a part of the basic jurisprudence of the land.

18. The Statement of Objects and Reasons to the Environment Act, inter alia, states as under:

“The decline in environmental quality has been evidenced by increasing pollution, loss of vegetal cover and biological diversity, excessive concentrations of harmful chemicals in the ambit atmosphere and in food chains, growing risks of environmental accidents and threats to life support system. The world community's resolve to protect and enhance the environmental quality found expression in the decisions taken at the United Nations Conference on the Human Environment held in Stockholm in June, 1972. Government of India participated in the Conference and strongly voiced the environmental concerns. While several measures have been taken for environmental protection both before and after the Conference, the need for a general legislation further to implement the decisions of the Conference has become increasingly evident..... Existing laws generally focus on specific types of pollution or one specific categories of hazardous substances. Some major areas of environmental hazards are not covered. There also exist uncovered gaps in areas of major environmental hazards. There are inadequate linkages in handling matters of industrial and environmental safety. Control mechanisms to guard against slow, insidious build up of hazardous substances, especially new chemicals, in the environment are weak. Because of a multiplicity of regulatory agencies, there is need for an authority which can assume the lead



role for studying, planning and implementing long term requirements of environmental safety and to give direction to, and coordinate a system of speedy and adequate response to emergency situations threatening the environment.... In view of what has been stated above, there is urgent need for the enactment of a general legislation on environmental protection which inter alia, should enable coordination of activities of the various regulatory agencies, creation of an authority or authorities with adequate powers for environmental protection, regulation of discharge of environmental pollutants and handling of hazardous substances, speedy response in the event of accidents threatening environmental and deterrent punishment to those who endanger human environments safety and health”.

Sections 3, 4, 5, 7 and 8 of the Environment Act which are relevant are as under:

“3. Power of Central Government to take measures to protect and improve environment. - (1) Subject to the provisions of this Act, the Central Government shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution. (2) In particular, and without prejudice to the generality of the provisions of section (1), such measures may include measures with respect to all or any of the following matters namely:-

- (i) co-ordination of actions by the State Governments, officers and other authorities-
  - (a) under this Act, or the rules made thereunder, or
  - (b) under any other law for the time being in force which is relatable to the objects of this Act;
- (ii) planning and execution of a nationwide programme for the prevention control and abatement of environmental pollution;
- (iii) laying down standards for the quality of environment in its various aspects;
- (iv) laying down standards for emission or discharge of environmental pollutants from various sources whatsoever:

Provided that different standards for emission or discharge may be laid down under this clause from different sources having regard to the quality or composition of the emission or discharge of environmental pollutants from such sources;

- (v) restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards;
- (vi) laying down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents;
- (vii) laying down procedures and safeguards for the handling of hazardous substances;

- (viii) examination of such manufacturing processes, materials and substances as are likely to cause environmental pollution;
- (ix) carrying out and sponsoring investigations and research relating to problems of environmental pollution;
- (x) inspection of any premises, plant, equipment, machinery, manufacturing or other processes, materials or substances and giving, by order, of such directions to such authorities, officers or persons as it may consider necessary to take steps for the prevention, control and abatement of environmental pollution;
- (xi) establishment or recognition of environmental laboratories and institutes to carry out the functions entrusted to such environmental laboratories and institutes under this Act;
- (xii) collection and dissemination of information in respect of matters relating to environmental pollution;
- (xiii) preparation of manuals, codes or guides relating to the prevention, control and abatement of environmental pollution;
- (xiv) such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act.

(3) The Central Government may, if it considers it necessary or expedient so to do for the purposes of this Act, by order, published in the Official Gazette, constitute an authority or authorities by such name or names as may be specified in the order for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under section 5) of the Central Government under this Act and for taking measures with respect to such of the matters referred to in sub-section (2) as may be mentioned in the order and subject to the supervision and control of the Central Government and the provisions of such order, such authority or authorities may exercise the powers or perform the functions or take the measures so mentioned in the order as if such authority or authorities had been empowered by this Act to exercise those powers or perform those functions or take such measures.

4. Appointment of officers and their powers and functions (1) Without prejudice to the provisions of sub-section 93) of section 3, the Central Government may appoint officers with such designations as it thinks fit for the purposes of this Act and may entrust to them such of the powers and functions under this Act as it may deem fit. (2) The officers appointed under sub-section (1) shall be subject to the general control and direction of the Central Government or, if so directed by that Government, also of the authority or authorities, if any, constituted under sub-section (3) of section 3 or of any other authority or officer”.

5. Power to give directions. - Notwithstanding anything contained in any other law but subject to the provisions of this Act, the Central

Government may, in the exercise of its powers and performance of its functions under this Act, issue directions in writing to any person, officer of any authority and such person, officer or authority shall be bound to comply with such directions. Explanation. - for the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct-

- (a) the closure, prohibition or regulation of any industry, operation or process; or
- (b) stoppage or regulation of the supply of electricity or water or any other service.

7. Persons carrying on industry, operation etc. not to allow emission or discharge of environmental pollutants in excess of the standards. - No person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutant in excess of such standards as may be prescribed.

8. Persons handling hazardous substances to comply with procedural safeguards. - No person shall handle or cause to be handled any hazardous substance except in accordance with such procedure and after complying with such safeguards as may be prescribed”.

19. Rule 3(1), 3(2), and 5(1) of the Environment (Protection) Rules 1986 (the Rules) are as under:

“3. Standards for emission or discharge of the environmental pollutants. - (1) For the purposes of protecting and improving the quality of the environment and preventing and abating environmental pollution, the standards for emission or discharge of environmental pollutants from the industries, operations or processes shall be as specified in (Schedule I to IV).

3(2) Notwithstanding anything contained in sub-rule 91), the Central Board or a State board may specify more stringent standards from those provided in (Schedule I to IV) in respect of any specific industry, operation or process depending upon the quality of the recipient system and after recording reasons, therefore, in writing.

5. Prohibition and restriction on the location of industries and the carrying on processes and operations in different areas:- (1) The Central Government may take into consideration the following factors while prohibiting or restricting the location of industries and carrying on of processes and operations in different areas:-

- (i) Standards for quality of environment in its various aspects laid down for an area.
- (ii) The maximum allowable limits of concentration of various environment pollutants (including noise) for an area.
- (iii) The likely emission or discharge of environmental pollutants from an industry,

process or operation proposed to be prohibited or restricted.

- (iv) The topographic and climatic features of an area.
- (v) The biological diversity of the area which, in the opinion of the Central Government, needs to be, preserved.
- (vi) Environmentally compatible land use.
- (vii) Net adverse environmental impact likely to be caused by an industry, process or operation proposed to be prohibited or restricted.
- (viii) Proximity to a protected area under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 or a sanctuary, National Park, game reserve or closed area notified, as such under the Wild Life (Protection) Act, 1972, or places protected under any treaty, agreement or convention with any other country or countries or in pursuance of any decision made in any international conference, association or other body.
- (ix) Proximity to human settlements.
- (x) Any other factors as may be considered by the Central Government to be relevant to the protection of the environment in an area”.

20. It is thus obvious that the Environment Act contains useful provisions for controlling pollution. The main purpose of the Act is to create an authority or authorities under Section 3(3) of the Act with adequate powers to control pollution and protect the environment. It is a pity that till date no authority has been constituted by the Central Government. The work which is required to be done by an authority in terms of Section 3(3) read with other provisions of the Act is being done by this Court and the other Courts in the country. It is high time that the Central Government realises its responsibility and statutory duty to protect the degrading environment in the country. If the conditions in the five districts of Tamil Nadu, where tanneries are operating, are permitted to continue then in the near future all rivers/canals shall be polluted, underground waters contaminated, agricultural lands turned barren and the residents of the area exposed to serious diseases. It is, therefore, necessary for this Court to direct the Central Government to take immediate action under the provisions of the Environment Act.

21. There are more than 900 tanneries operating in the five districts of Tamil Nadu. Some of them may, by now, have installed the necessary pollution control measures, they have been polluting the environment for over a decade and in some cases even for a longer period. This Court has in various orders indicated that these tanneries are liable to pay pollution fine. The polluters must compensate the affected persons and also pay the cost of restoring the damaged ecology.

22. Mr. M.C. Mehta, learned counsel for the petitioner has invited our attention to the Notification GOMs No. 213 dated March 30, 1989 which reads as under:

“Order:-

In the Government Order first read above, the Government have ordered, among other things, that no industry causing serious water pollution should be permitted within one kilometre from the embankments of rivers, streams, dams etc. and that the Tamil Nadu Pollution Control Board should furnish a list of such industries to all local bodies. It has been suggested that it is necessary to have a sharper definition for water sources so that ephemeral water collections like rain water ponds, drains, sewerages (biodegradable) etc. may be excluded from the purview of the above order. The Chairman, Tamil Nadu Pollution Control Board has stated that the scope of the Government Order may be restricted to reservoirs, rivers and public drinking water sources. He has also stated that there should be a complete ban on location of highly polluting industries within 1 Kilometre of certain water sources.

2. The Government have carefully examined the above suggestions. The Government impose a total ban on the setting up of the highly polluting industries mentioned in Annexure - I to this order within one Kilometre from the embankments of the water sources mentioned in Annexure-II to this order.

3. The Government also direct that under any circumstance if any highly polluting industry is proposed to be set up within one kilometre from the embankments of water sources other than those mentioned in Annexure-II to this order, the Tamil Nadu Pollution Control Board should examine the case and obtain the approval of the Government for it”.

Annexure-I to the Notification includes Distilleries, tanneries, fertilizer, steel plants and foundries as the highly polluting industries. We have our doubts whether the above quoted government order is being enforced by the Tamil Nadu Government. The order has been issued to control pollution and protect the environment. We are of the view that the order should be strictly enforced and no industry listed in Annexure-I to the order should be permitted to be set up in the prohibited area.

23. Learned counsel for the tanneries raised an objection that the standard regarding total dissolved solids (TDS) fixed by the Board was not justified. This Court by the order dated April 9, 1996 directed the NEERI to examine this aspect and give its opinion. In its report dated June 11, 1996 NEERI has justified the standards stipulated by the Board. The reasoning of the NEERI given in its report dated June 11, 1996 is as under:-

“The total dissolved solids in ambient water have physiological, industrial and economic significance. The consumer acceptance of mineralized water decreases in direct proportion to increase mineralization as indicated by Bruvold (1). High Total dissolved solids (TDS), including chlorides and sulphates, are objectionable due to

possible physiological effects and mineral taste that they impart to water. High levels of total dissolved solids produce laxative/cathartic/purgative effect in consumers. The requirement of soap and other detergents in household and industry is directly related to water hardness as brought out by Deboer and Larsen (2). High Concentration of mineral salts, particularly sulphates and chlorides, are also associated with costly corrosion damage in wastewater treatment systems, as detailed by Patterson and Banker (3). Of particular importance is the tendency of scale deposits with high TDS thereby resulting in high fuel consumption in boilers.

The Ministry of Environment and forests (MEF) has not categorically laid down standards for inland surface water discharge for total dissolved solids (TDS), sulphates and chlorides. The decision on these standards rests with the respective State Pollution Control Boards as per the requirements based on local site conditions. The standards stipulated by the TNPCB are justified on the afore referred considerations.

The prescribed standards of the TNPCB for inland surface water discharge can be met for tannery wastewaters cost-effectively through proper implant control measures in tanning operation, and rationally designed and effectively operated wastewater treatment plants (ETPs & CETPS). Tables 3 and 5 depict the quality of groundwater in some areas around tanneries during peak summer period (June 3-5, 1996). Table 8 presents the data collected by TNPCB at individual ETPs indicating that TDS, sulphates and chlorides concentrations are below the prescribed standards for inland surface water discharge. The quality of ambient waters needs to be maintained through the standards stipulated by TNPCB.”

24. The Board has the power under the Environment Act and the Rules to lay down standards for emissions or discharge of environmental pollutants. Rule 3(2) of the Rules even permit the Board to specify more stringent standards from those provided under the Rules. The NEERI having justified the standards stipulated by the Board, we direct that these standards are to be maintained by the tanneries and other industries in the State of Tamil Nadu.

25. Keeping in view the scenario discussed by us in this judgment, we order and direct as under :-

1. The Central Government shall constitute an authority under Section 3(3) of the Environment (Protection) Act, 1986 and shall confer on the said authority all the powers necessary to deal with the situation created by the tanneries and other polluting industries in the State of Tamil Nadu. The Authority shall be headed by a retired judge of the High Court and it may have other members - preferably with expertise in the field of pollution control and environment protection - to be appointed by the Central Government. The Central Government shall confer on the said authority the

powers to issue directions under Section 5 of the Environment Act and for taking measures with respect to the matters referred to in Clauses (v), (vi) (vii) (viii) (ix) (x) and (xi) of sub-Section (2) of Section 3. The Central Government shall constitute the authority before September 30, 1996.

2. The authority so constituted by the Central Government shall implement the "precautionary principle" and the "polluter pays" principle. The authority shall, with the help of expert opinion and after giving opportunity to the concerned polluters assess the loss to the ecology/environment in the affected areas and shall also identify the individuals/families who have suffered because of the pollution and shall assess the compensation to be paid to the said individuals/families. The authority shall further determine the compensation to be recovered from the polluters as cost of reversing the damaged environment. The authority shall lay down just and fair procedure for completing the exercise.

3. The authority shall compute the compensation under two heads namely, for reversing the ecology and for payment to individuals. A statement showing the total amount to be recovered, the names of the polluters from whom the amount is to be recovered, the amount to be recovered from each polluter, the persons to whom the compensation is to be paid and the amount payable to each of them shall be forwarded to the Collector/District Magistrates of the area concerned. The Collector/District Magistrate shall recover the amount from the polluters, if necessary, as arrears of land revenue. He shall disburse the compensation awarded by the authority to the affected persons/families.

4. The authority shall direct the closure of the industry owned/managed by a polluter in case he evades or refuses to pay the compensation awarded against him. This shall be in addition to the recovery from him as arrears of land revenue.

5. An industry may have set up the necessary pollution control device at present but it shall be liable to pay for the past pollution generated by the said industry which has resulted in the environmental degradation and suffering to the residents of the area.

6. We impose pollution fine of Rs. 10,000/- each on all the tanneries in the districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. The fine shall be paid before October 31, 1996 in the office of the Collector/District Magistrate concerned. We direct the Collectors/District Magistrates of these districts to recover the fines from the tanneries. The money shall be deposited, alongwith the compensation amount recovered from the polluters, under a separate head called "Environment Protection Fund" and shall be utilised for compensating the affected persons as identified by the authorities and also for restoring the damaged environment. The pollution fine is liable to be recovered as

arrears of land revenue. The tanneries which fail to deposit the amount by October 31, 1996 shall be closed forthwith and shall also be liable under the Contempt of Courts Act.

7. The authority, in consultation with expert bodies like NEERI, Central Board shall frame scheme/schemes for reversing the damage caused to the ecology and environment by pollution in the State of Tamil Nadu. The schemes/schemes so framed shall be executed by the State Government under the supervision of the Central Government. The expenditure shall be met from the "Environment Protection fund" and from other sources provided by the State Government and the Central Government.

8. We suspend the closure orders in respect of all the tanneries in the five districts of North Arcot Ambedkar, Erode Periyar, Dindigul Anna, Trichi and Chengai M.G.R. We direct all the tanneries in the above five district to set up CETPs or Individual Pollution Control Devices on or before November 30, 1996. Those connected with CETP's shall have to install in addition the primary devices in the tanneries. All the tanneries in the above five districts shall obtain the consent of the Board to function and operate with effect from December 15, 1996. The tanneries who are refused consent or who fail to obtain the consent of the Board by December 15, 1996 shall be closed forthwith.

9. We direct the Superintendent of police and the Collector/District Magistrate/Deputy Commissioner of the district concerned to close all those tanneries with immediate effect who fail to obtain the consent from the Board by the said date. Such tanneries shall not be reopened unless the authority permits them to do so. It would be open to the authority to close such tanneries permanently or to direct their relocation.

10. The Government Order No. 213 dated March 30, 1989 shall be enforced forthwith. No new industry listed in Annexure-I to the Notification shall be permitted to be set up within the prohibited area. The authority shall review the cases of all the industries which are already operating in the prohibited area and it would be open to authority to direct the relocation of any of such industries.

11. The standards stipulated by the Board regarding total dissolved solids (TDS) and approved by the NEERI shall be operative. All the tanneries and other industries in the State of Tamil Nadu shall comply with the said standards. The quality of ambient waters has to be maintained through the standards stipulated by the Board.

26. We have issued comprehensive directions for achieving the end result in this case. It is not necessary for this Court to monitor these matters any further. We are of the view that the Madras High Court would be in a better position to monitor these matters hereinafter. We, therefore, request the Chief Justice of the Madras High Court to constitute a special Bench "Green Bench" to deal with this

case and other environmental matters. We make it clear that it would be open to the Bench to pass any appropriate order/orders' keeping in view the directions issued by us. We may mention that "Green Benches" are already functioning in Calcutta, Madhya Pradesh and some other High Courts. We direct the Registry of this Court to send the records to the registry of the Madras High Court within one week. The High Court shall treat this matter as a petition under Article 226 of the Constitution of India and deal with it in accordance with law and also in terms of the directions issued by us. We give liberty to the parties to approach the High Court as and when necessary.

27. Mr. M.C. Mehta has been assisting this Court to our utmost satisfaction. We place on record our appreciation for Mr. Mehta. We direct the State of Tamil Nadu to pay Rs. 50,000/- towards legal fees and other out of pocket expenses incurred by Mr. Mehta.



## JUDGEMENT

### IN COURT

This suit was filed in 1991 seeking *inter alia* injunctive relief in relation to the mining of sand at Palmetto Point. A declaration that the plaintiff is lawfully entitled to raise and collect all revenue paid by the second and or third defendants in respect of the winning and mining and exporting of sand from the Island of Barbuda. Damages for the wrongful excavation of areas of Palmetto Point to below the water level thereby exposing the groundwater table to pollution.

Hearing of this matter began on the 30 September 1992.

**Ephraim Georges. J.** in a well reasoned written judgement granted an injunction against the defendants in the following terms:-

“It is **ORDERED AND DIRECTED** that the second and third defendants, Antigua Aggregates Limited and SANDCO Limited by themselves or by their servants or Agents or otherwise be restrained and an Injunction is hereby granted restraining them from winning or mining sand outside the boundaries of the area at Palmetto Point Barbuda established by the plaintiff and designated by public signs and notices until after trial of this action or until further order ...”

On 14 October 1992 the defendants files Summons and unsuccessfully made application to have the order of 30 September to be set aside or varied. The application was made on behalf of the first named defendant and third named defendant.

In refusing the application the learned Judge said at page 4 of his judgement:-

“Whilst the thrust of Learned Counsel’s argument is certainly appreciated there is no doubt whatsoever in my mind that the first defendant has not established a legal right to be heard in the instant application which primarily concerns the plaintiff and third defendant. The order essentially affects the private (mining) rights of the second and third defendants vis a vis the plaintiff. This is what the original application of the respective parties was all about and which resulted in the order of the Court of 30 September 1992. This concerns the private rights of a company and the first defendant does not come into the picture at this stage. Furthermore, since the ground of the application of the first and third defendants in the circumstances clearly is an abuse of the process of the Court and seems merely to serve as a lever to promote the interests of the third defendant. The first defendant himself having no legal interest in the matter at this particular point.”

Hearing of the substantive matter resumed on 1<sup>st</sup> April through to 7<sup>th</sup> April 1993. At the conclusion of the hearing

on 7 April 1993 the matter was adjourned to 14 June 1993. Just before the adjournment was taken Learned Counsel for the defendants enquired of Counsel for the plaintiff in open Court whether the plaintiff would consent to a variation of the order of 30 September 1992. Counsel for the plaintiff did not consent to this variation.

On May 20 1993 Solicitor for the plaintiff filed Motion for committal against Reuben Wolff and a Notice of Motion for committal, for abetting breach of Injunction. Both Notices of Motion filed on the same date. In Notice of Motion the plaintiff seeks an order that Reuben Wolff Managing Director of Antigua Aggregates Limited and General Manager of SANDCO Limited and Knackbill Nedd Director and shareholder of SANDCO Limited:-

- (a) Be committed to Her Majesty’s Prison for contempt of Court in refusing to obey the order of Mr. Justice Ephraim Georges dated the 30 of September 1992.
- (b) For leave to issue a Writ of sequestration against the property of the second and third defendants and or against the property of the aforesaid Reuben Wolff and Knackbill Nedd for their contempt of Court in refusing to obey the said order of Mr. Justice Ephraim Georges dated the 30<sup>th</sup> day of September 1992 by:-
  - 1) Conspiring with and allowing first defendant to use the second and or third defendant’s bulldozers, trucks sand mining equipment, personnel, servants and agents for the purpose of enabling the said first defendant to win and or mine sand outside the boundaries of the area at Palmetto Point Barbuda established by the plaintiff ad designated by public signs and notices on behalf of the second and third defendants or on their own behalf.
  - 2) That the said Antigua Aggregates Limited Reuben Wolff and Knackbill Nedd do pay the Barbuda Council its costs of and incidental to this application and the order to be made thereon.
  - 3) That such further or other order be made as to the Court shall deem proper.

The Notice of Motion for Committal for Abetting Breach of Injunction, the plaintiff seeks an order in the following terms:-

- 1) That Hilroy Humphreys of Temple Street, St. John’s Minister of Agriculture, Fisheries, Lands and Housing do stand committed to Her Majesty’s Prison in St. John’s for his contempt in aiding and abetting the above named defendants Antigua Aggregates Limited and SANDCO Limited in mining and winning sand at Palmetto Point Barbuda outside the area designated by the plaintiff and marked by public signs and notice notwithstanding an Order dated 30<sup>th</sup> September, 1992 made in this action of which the Hilroy Humphreys had notice by:-

- “1) Authorizing the use of the third defendants equipment for the mining and winning of sand.
- 2) Selling the sand so mined to the third defendant.
- 3) Authorizing the third defendant to transport the sand process it, load it on vessels, and ship it at the third defendant’s expense.
- 4) Requesting and obtaining approval for the development of armed members of the Antigua and Barbuda Defense Force in the areas where said mining operations are carried out.
- 2) That Hilroy Humphreys do pay to the plaintiff its costs of and incidental to this application and to the order to be made thereon and of issuing and executing the Warrant of Committal.
- 3) That such further or other order may be made as to the Court shall deem proper...”

An affidavit of the Motions for Committal was deposed to by Mr. Kenzie Frank secretary to the Barbuda Council and filed on 20<sup>th</sup> May, 1993. I now refer to what I consider to be the important paragraphs of this affidavit.

“6 ... On 20 April 1993 I observed that sand was being mined in an area called “The Copse” which is outside the area designated by the plaintiff and referred to in the Order dated 30 September 1992. The mining was being done by a bulldozer owned by the second and/or third defendants and sand was being deposited into trucks owned by the second and or third defendants. The persons operating the bulldozer and the two trucks were servants of the second and or third defendants and have been such servants during the period of the sand mining operations by SANDCO. Knackbill Nedd, a Director of the second defendant, Thomas Sharpe the Manager of Operations of the said third defendants, and Reuben Wolff, were present supervising and overseeing the said mining operations. Written on the back of the said bulldozer were the words “Rented to the Ministry of Agriculture and Housing.”

“9 ... I have on a number of occasions subsequent to the 20 April 1993 to present time witnessed the said Knackbill Nedd, operating a front end loader owned by Sandco Ltd. Loading sand previously mined onto trucks owned by the Antigua Aggregates Limited and/or Sandco Limited which said trucks were driven to the wharf at the river and loaded onto barges for shipment.

10. The area known as “The Copse” and the lands in the vicinity have been traditionally used for agricultural purposes and on 5 September 1991 the Barbuda Council in pursuance of its powers under the Barbuda Local Government Act and the Barbuda Act decided that these areas should be reserved for agriculture. The second and third defendants were informed by this decision by letter dated 1 October 1991 a copy of which is exhibited hereto and marked M.F.6

11. Since 19 April 1993 armed members of the Antigua and Barbuda Defence Force have been deployed throughout the Island of Barbuda and in particular have been deployed at Bumpy Well

and the Broady area which are close to the sand mining operations. I have seen a letter written by Hilroy Humphreys, Minister of Agriculture Lands, Fisheries and Housing to the Commissioner of Police requesting the assistance of the Police stationed in Barbuda to facilitate the mining of the sand at the Palmetto Point. The said letter was copied to and/or passed on to Inspector Marshall who is in-charge of the police stationed in Barbuda, and I am of the firm belief that the deployment of the Defence Force aforesaid has been done at the specific request of the said Hilroy Humphreys.

12. I have observed that the sand has been shipped by barges which have hitherto supplied sand to Antigua, St. Thomas and other locations in the Caribbean and do verily believe that the sand mined outside of the boundaries designated by the Barbuda Council referred to in order dated 30 September 1992 has been sold by Sandco Limited on 13 May 1993. The plaintiff received a letter by local mail containing extract from the minutes of a cabinet meeting held on Wednesday 27 January 1993, a copy of which is exhibited hereto and marked M.F.7.”

I now refer to Reuben Wolff’s Affidavit filed on 2 June 1993.

“3. As to paragraphs (2) and (3) of the said Affidavit of McKenzie Frank I admit that the Honourable Mr. Justice Georges made an Order dated the 30<sup>th</sup> day of September 1992, and entered on 30<sup>th</sup> day of September 1992. I am advised by Counsel and verily believe that the Order made and entered on 30<sup>th</sup> day of September 1992 was not the same served on the second and third defendants on 18<sup>th</sup> May 1993. There was no endorsement as appears on page 2 of Exhibit M.F. 1 or at all the first time that there was served an Order bearing an endorsement was on 10<sup>th</sup> May 1993 am advised by Counsel and verily believe that the exhibit M.F. 1 was not the Order which was made and entered that the entire “endorsement” should be expunged and that the purported endorsement is of no legal effect.

“6 ... I say that on 20<sup>th</sup> April 1993 sand was mined in an area outside the area purported to be designated by the plaintiff and referred to in the Order dated 30<sup>th</sup> September 1992. The said mining was not done on 20<sup>th</sup> April 1993 or at anytime by the second and third defendants, or by any servants or agents on their behalf or by Knackbill Nedd or by Thomas Sharpe or by myself .. Neither Knackbill Nedd nor Thomas Sharpe, nor myself took any part in any supervising or overseeing the said mining operations as alleged or at all the mining was done by a bulldozer which was and is owned by the third defendant. The second defendant did not and does not own wholly or partly the said bulldozer. On the said bulldozer there was clearly marked the words “Rented to the Ministry of Agriculture, Fisheries, Lands and Housing.”

10. ... Consequent upon ... Cabinet Decision of 27<sup>th</sup> January 1993 the Ministry of Agriculture



Fisheries, Lands and Housing ... entered into an agreement on 27<sup>th</sup> February, 1993 with SANDCO Limited to rent one D.6 bulldozer for the purpose of mining sand by the Government in Barbuda. Honourable Hilroy Humphreys, Minister of Agriculture Fisheries, Lands and Housing signed the agreement for the Government and I signed for SANDCO Limited. I negotiated the terms of the agreement with Minister Humphreys. A copy of the said agreement with Minister Humphreys. A copy of the said agreement is exhibited hereto and marked R.W.3. In pursuance of the above agreement R.W.3. the Government rented from SANDCO Limited one D6 bulldozer upon which were printed the words “Rented to Ministry of Agriculture Fisheries, Lands and Housing. The government engaged Johnny De Souza, a competent operator approved by SANDCO Ltd. to operate the said bulldozer provided by the Government to win and mine sand in areas specified by a Government representative. Johnny Desouza was engaged as an Independent Contractor. A copy of a letter of agreement between the said Ministry dated 8 March 1993 and signed by Johnny Desouza, on behalf of SANDCO Limited. I terminated the contract of employment of Johnny Desouza with SANDCO limited by letter dated March 19 1993 effective April 20<sup>th</sup> 1993. A copy of the said letter of termination is exhibited hereto and marked R.W. 5.

“In pursuance of the agreement R.W. 4 from 20<sup>th</sup> April, 1993, Johnny Desouza has operated the said D.6 bulldozer on behalf of the said Ministry and Government for the purpose of wining and mining sand in area specified by a government representative. Such winning and mining of sand has not been done by Johnny Desouza or anyone else on the instructions or on behalf of the second and third defendants or myself.”

11. Consequent on the above Cabinet decision of 27<sup>th</sup> January 1993, the Ministry of Agriculture, Fisheries, Lands and housing ... entered into an agreement on 24<sup>th</sup> February 1993 with Sandco Limited to sell Sandco Limited al sand which the Government will mine in Barbuda on or after 24<sup>th</sup> February 1993 on the terms contained in the said agreement Clause 2 States: “SANDCO shall take deliver of sand from Government after Government has won a mined the sand. Upon delivery, SANDCO shall become the owner of the sand so delivered, and shall thereafter all expenses for the removal and/or processing and/or shipping of the said sand.” Honourable Hilroy Humphreys signed the agreement for the said Ministry for the Government and I Reuben Wolff signed for SANDCO Limited. I negotiated the terms of agreement with Minister Humphreys. In pursuance of the said agreement as from 20 April 1993, the Government has sold and delivered all the sand which it has won and mined in Barbuda. According to the terms of the said agreement.

Further in pursuance of the said agreement, Kanckbill Nedd and other employees of SANDCO Limited had operated a front-end loader owned

by SANDCO Limited to load sand previously mined and sold and delivered to SANDCO Limited. According to the terms of R.W. 6 [the agreement] owned by Antigua Shells Limited and operated on behalf of SANDCO Limited.

13. ... I am advised by Counsel and verily believe that any decision reserving the said area for agriculture is null and void and of no effect. I am advised by Counsel and verily believe that the letter from McKenzie Frank to the Manager SANDCO Limited dated 18 October 1991 is of no legal effect, that any decision or resolution stated therein is of no legal effect is outside of the power of the plaintiff and is contrary to law.

15. ... The third defendant Sandco has shipped sold and otherwise disposed of all sand sold and delivered to it by the Ministry of Agriculture Fisheries, Lands and Housing for the Government since 20<sup>th</sup> April 1993.”

I shall refer to parts of the other affidavits from time to time throughout this judgement.

Learned Senior Counsel Mr. Luckhoo on behalf of the defendants referred to the 1905 Barbuda Ordinance No: 2 of 1901 which by Section 12 thereof states that all lands within the island of Barbuda are vested in the Governor on behalf of the Crown and shall be dealt with in accordance with the provision of the Ordinance. Learned Counsel also referred to ordinance No: 6 of 1904 as amended by Ordinances nos. 8 of 1904, 4 of 1908, 2 of 1901 and 16 of 1920.

The preamble reads:-

“Whereas the island of Barbuda is the property of the Crown and special laws are necessary with respect thereto.”

After referring to a number of sections under the above mentioned Ordinance and to other Statutes dealing with land tenure in Barbuda, Mr. Luckhoo submitted as follows:-

- 1) There are no provisions under the Barbuda Act, CAP 121, permitting the Council to hold land or lease Crown lands for the purposes of mining.
- 2) All inhabitants of Barbuda are tenants of the Crown, and tenants at will.
- 3) There has never been any express grant of lands to the inhabitants or the Council for mining.
- 4) The Government has exclusive and legal control of all lands for mining operations.

Senior Counsel also referred to the Barbuda Local Government Act No. 16 of 1976 and posed the question, does the Council have the right to collect revenue from the mining of sand? This is one of the questions which is required to be answered in the substantive matter. Mr. Luckhoo submitted that the Council has never acquired or held any Crown lands on which sand mining has taken

place. Counsel also referred to a judgement which I had given on 27<sup>th</sup> February 1990, involving the same parties on an application by the plaintiff for an injunction in which judgement I had said that the law was clear and unambiguous that the lands in Barbuda are vested in the Crown.

On this Counsel submitted that government had this decision coupled with the fact that there is no injunction and there could be no injunction against the Crown preventing it from mining sand, entitles the Government to take the decision on 27 January 1992 and to act in pursuance of such decision.

I have referred to the above submissions, in deference to Senior Counsel but in my opinion these submissions are totally without merit. The fact that the lands in Barbuda are vested in the Crown, if they are so vested cannot absolve the defendants if they have breached an Order of the Court. What is important therefore is, was there a valid order of the Court and did the defendants breach that Order or refuse to obey that Order.

Mr. Luckhoo further submitted that the Honourable Hilroy Humphreys is Minister of Agriculture, Fisheries, Lands and housing and exercises his powers in all matters relating to the mining of sand in Barbuda in accordance with Law.

I have no doubt that Honourable Humphreys is Minister of Agriculture, Fisheries, Lands and Housing and is responsible for administering the matters which fall under his portfolio from 24 December 1991 (See Antigua and Barbuda Official Gazette January 2, 1992) but it goes without saying that he must administer these matters in a lawful manner:

Mr. Luckhoo submitted that:

“Mr. Humphreys holds that Portfolio up to the present time and as a Minister of Government he is protected by the Crown Proceedings Act and by Section 16 thereof the Crown acts through its officers. If there can be no injunction against the Crown there can be no contempt by a Minister for aiding and abetting when that Minister was not served with the original Order and when that Minister performed all his acts in his capacity as a Minister and in furtherance of a Cabinet Decision of 27 January 1993.”

Later on when Mr. Luckhoo was asked by me if he would like to elaborate on the submission or if he had any authority in support, Learned Counsel replied:

“I do not wish to add anything to that statement. He (Humphreys) was not actively engaged in any breach of any injunction.”

I now analyze that submission. It is an undisputed fact that the Government acts through its Ministers.

The section referred to above declares that an injunction may not be granted against the Crown. It is also provided that an injunction would not be granted against a Minister of the Crown if the effect of that injunction is to grant an injunction against the Crown (**See Underhill and Another v Ministry of Food 1950 1 CHD 591**) the rationale is very clear an injunction prevents one from doing a particular act under threat of imprisonment or fine if that Order is disobeyed. The Law then in its wisdom said it would not be prudent to grant an injunction against the Crown because a Government’s legislative programme could be hamstrung of everytime a Government put forward legislation through its Ministers on a particular issue the subject could bring an injunction to prevent that particular issue going forward. That indeed would be most undesirable. But of course the law presupposes that the Government or the government through its Ministers would act lawfully. The law on the other hand, stipulates that in place of an injunction a declaratory Order may be made against the Crown.

While I was writing this judgment, I recalled that I had read judgement in the Times Newspaper, Re m on July 26 1991 in which the report reads as follows:

“Neither the Crown nor its officers could be impeded for Contempt of Court. Undertakings given on behalf of the Crown to Courts constituted no more than unenforceable assurances resting on a matter of trust.”

**Simon Browne J.** so held in a reserved judgement in the Queens Bench Division when dismissing the application of **M** to commit the Home Office, and the Home Secretary for Contempt of an undertaking given on their behalf to Mr. Justice Garland not to remove **M** from the jurisdiction and of a subsequent mandatory Order requiring that **M** be not removed and when removed be returned to the jurisdiction.

Unfortunately, there was no argument on this matter so whatever I say in relation to this case is without any input from the Bar. I was inclined however not to follow this case because, in my view it is distinguishable from the instant case.

However, it was brought to my attention that this case went on appeal. (**See M v Home Office and Another – 1992 4 All E.R. 97**)

The Court of Appeal reversed the decision of Simon Browne J. Lord Donaldson M.R. in his summary of reasons at page 141 said:

“(12) Ministers and Civil Servants are accountable to the Law and to the Courts for their personal actions and can be proceeded against for Contempt of Court.

(13) Mr. Kenneth Baker as Home Secretary was in Contempt of Court by reason of his personal decision on 2

May to cancel the return flight of **M** to this country.”...

There was an appeal to the House of Lords. The House of Lords in July 1993 upheld the judgement of the Court of Appeal. Unfortunately I have not seen the Law report. I have however seen the report of the Times Newspaper which quoted Lord Templeman as saying:

“The argument that there is no power to enforce the Law by injunction or contempt proceedings against a Minister in his official capacity would if upheld, establish the proposition that the executive obey the Law as a matter of grace and not” “as a matter of necessity. A proposition which would reverse the result of the Civil War.”

A declaratory Order does not possess the sting that an injunction has. But even so where a declaratory Order is granted, out of decency and respect for the authority of the Law it is expected that that declaratory Order would be observed. A Minister cannot be said to be acting lawfully if he is found in violation of Court Order.

It is a fact that because of our history we inherit most of our Laws and our instructions from England, whether we like it or not. The use of the word “Crown” in the section is a vivid reminder of that fact. Protection under Crown Proceedings Act, would never be claimed on behalf of a Minister in England if that Minister were to act in the manner as Minister Humphreys allegedly acted. I go so far as to say without any fear of contradiction that a Minister of the Crown in England dare not act in that manner.

If one were to take Counsel’s argument to its logical conclusion it means that any act done by a Minister, whether that act be criminal or otherwise once that act is done in his capacity as a Minister and in furtherance of a Cabinet Decision that Minister is protected under the Crown Proceedings Act. How startling! Surely that cannot be the Law.

In that submission Learned Counsel argued there was no injunction against the Crown, therefore there can be no contempt by a Minister for aiding and abetting. The first point I wish to make is that aiding and abetting the breach of an injunction is a criminal act and if it is found that the Minister aided and abetted the breach of the injunction, he is in the same position as John citizen and in that regard the injunction need not be made against him or the Crown as Learned Senior Counsel contended, all that has to be shown is that he knew of the existence of the injunction and of its terms and having that knowledge he aided and abetted the defendants in its breach.

**SEWARD AND OTHERS V PATERSON 1895 – 1699 ALL E.R. (REP) 1127**

This was an appeal against a decision of **NORTH, J.**, on a motion by the plaintiffs Seaward and others to commit one Edwin Murray for contempt.

The plaintiffs were William Seaward, the lessee of premises known as 53, Fetter Lane, an under-lessee of part of the premises and a mortgagee of such under-lessee of part of the premises and a mortgagee of such under-lessee. The defendant William Paterson was the under-lessee of part of the premises from Seaward, which lease contained a covenant. The object of the action was to restrain the defendant from holding upon the premises boxing contests which had been advertised under the name of meetings of the Queensburg Sports Club, Ltd. The action was heard on July 15 1896, and a perpetual injunction was granted restraining the defendant George Paterson his agents ad servants from doing anything which may interfere with the full and quiet enjoyment by the plaintiff or his under-tenants of the premises or which shall be or tend to grow to be an annoyance, nuisance to the plaintiff William Seaward. On October 9 and 21 boxing entertainment were given on the defendant’s premises, which the court held to be a clear breach of the injunction. On November 11, 1896, the plaintiffs moved to commit Paterson and Sheppard, a prize-fighter, who, it was alleged, had acted as servant and agent in the matter. Paterson swore an affidavit that he had never, since the date of the order, had any control over th premises; that Edwin Murray took possession of the premises in December 1895, and had put into possession the Queensburg Sports Club Ltd., that he had taken the house at Murray’s request, under a promise that Murray would indemnify him; that all profits of the club were to belong to Murray; and that the action had been defended in Paterson’s name by Murray’s solicitors, on his instructions, and with funds found by him. The plaintiffs then amended the notice of motion by asking to commit Murray as well as others.

It should be noted that the injunction was granted against Murray. At the trial it was found that Murray was present at the boxing contests on October 9 and 21, not merely as a spectator, but as a person interested in the premises and in the proceeds of the performance. In giving judgement **NORTH, J.** said:

“In my opinion any person who deliberately assists another in committing a breach of an injunction can be punished for contempt of Court in taking part in the commission of the act. As regard servants and agents, I think that there is an explanation of those words often being used in such a case. I thing they are inserted as a warning to other persons. The words servants and agents are I think, used not as describing a particular class of persons, but as describing any persons who act as servants or agents, or assistants of the person who is restrained, and I do not think there is any magic in the words...”

**LINDLEY, L.J.** at page 1139 said:

“After the injunction there comes the important part of the case. Circulars are sent out to the members of the club informing them of the

proposed boxing contests which took place in October whoever sent out those circulars, knowing of the injunction, did that which was obviously most improper. I cannot be so blind as to suppose that Murray knew nothing about those things. I cannot imagine it for a moment. At all events, he goes to the place upon those two occasions which are specified there were thirty or forty people there and he was then present. We are asked to say that he was there simply as spectator. I do not believe a word of it. The view taken by **NORTH. J.** is this:

“Looking at the history of Murray’s connection with the club I have not the least doubt as to the character in which he was present on the occasion in question. He was not there as mere spectator, but he was there” “as one of the persons interested that, I consider, is proved by the statements which are really not in dispute between the parties, looking at the whole of the evidence.”

I now refer to the important case of:

**ATTORNEY GENERAL V NEWSPAPER PUBLISHING PLC AND OTHERS 1987 3 ALL E.R. 276**

Wright, a former member of the British Security Service who had access to highly classified and sensitive information proposed to publish his memoirs in Australia, but in 1985 the Attorney General obtained an interim injunction in Australia restraining him from publishing. In June two British newspapers published material derived from his memoirs. In June 1986 the Attorney General commenced proceedings seeking to restrain the two newspapers from publishing in England materials relating to his memoirs and was in the meantime, granted interlocutory injunctions to restrain such publication pending trial of the action. In April, 1987, the three defendant newspapers, who had not been parties to the 1986 proceedings published further materials derived or taken verbatim from his memoirs. The Attorney General obtained leave to bring proceedings against the defendant for criminal contempt of court.” “Held – The Attorney General’s appeal would be allowed for the following reasons:

- (1) It was well established that an act which interfered with the course of justice was capable of constituting a contempt of court. Furthermore the court’s power to commit for contempt where the conduct complained of was intended to impede or prejudice the administration of justice was saved by Section 6 (a) of the 1981 Act, and accordingly, where the court had made orders to the subject matter of an action pending trial, a third party who knew of those orders but who nevertheless destroyed or seriously damaged the subject matter ... be guilty of criminal contempt. If in doing so he intended to impede or prejudice the administration of justice.
- (2) Given the inherently perishable nature of confidential information and the irremediable

damage which publication would cause, the court had in July 1986, as was normal, decided that publication of confidential information derived from ... memoirs ought to be restrained pending trial of the action and the defendants, although strangers to the action had interfered with the administration of justice in publishing material taken or derived from ... memoirs when they knew that the court had made orders designed to protect the confidentiality of that material pending trial.

“Accordingly the defendants actions in publishing, could amount to a criminal contempt and the matter would therefore be remitted to the High Court to determine whether the defendants’ conduct did in fact amount to contempt.”

I should point out that in Antigua and Barbuda there is no Law of contempt, the common Law therefore prevails. I shall also add that the common Law is wider in its application than Section 6 (a) of the 1981 Act of England.

I now analyze the Minister’s conduct in order to determine whether that conduct is capable of aiding and abetting the breach of the Order of Georges J. of 30 September 1992.

The first point I make in that regard is that the Minister knew of the Order. He said so in his affidavit. Paragraph 3 thereof .. “I admit that the Honourable Mr Justice Georges made an Order of 30 September 1992.”

First of all I refer to Cabinet Decision of 27 January, 1993 which in the following terms:

**IN THE CABINET OF ANTIGUA AND BARBUDA SAND MINING OPERATIONS IN BARBUDA – SANDCO**

- (5) Cabinet considered the serious shortage from the sand mining operations in Barbuda which have been seriously restricted as a result of an interim Court injunction against SANDCO Limited.
- (6) Cabinet after full consideration of the representation made by the Minister authorized the Ministry of Agriculture Fisheries, Lands and Housing, to mine areas at Palmetto Point, Barbuda, for export and for Antigua and Barbuda, until the final determination of the current Law Suit No. 456 of 1988 between Barbuda Aggregates Limited and SANDCO Limited, defendants. The mining is to be done by the Government as the lands are by Law vested in the Crown.
- (7) Cabinet further authorized the Ministry of Agriculture, Fisheries, Lands and Housing to rent equipment from SANDCO in order to mine the sand, to sell and deliver to SANDCO Limited for (three) \$3.00 E.C. per cubic yard at the mining site, and to authorize SANDCO Limited to transport the sand to the processing area, to process the sand, to load it on vessels and to ship it at SANDCO’s expense.

- (8) Cabinet further agreed that the Ministry of Agriculture, Fisheries, Lands and Housing should enter into agreement with SANDCO Limited as set out in appendices A and B of these minutes.”

Before turning to the appendices I make the following observations:- From the minutes there is absolutely no doubt in my mind that the Honourable Hilroy Humphreys took the matter to Cabinet. I entertain no doubt for two reasons that he must have known of the terms of the injunction. Firstly the Cabinet minute speaks of the serious shortage of sand from the sand mining operations in Barbuda, which have been severely restricted as a result of an interim Court injunction against SANDCO Limited. Secondly the first named defendant made application to the Court on October 14 1992 just three months prior to the Minister taking the matter to Cabinet to have the Order of **Georges. J.** of 30 September 1992 discharged.

Appendix A is the agreement between Government and SANDCO Limited.

- Clause 1: States inter alia that the Government shall sell to SANDCO all sand which the Government will mine in Barbuda.
- Clause 2: States that SANDCO shall take delivery of sand mined. At the time of delivery SANDCO shall become the owner of the sand so delivered.
- Clause 3: States that the agreement is for a period of twelve (12) months, but may be terminated by either party giving seven days notice in writing.

Appendix B is in the following terms:

**AGREEMENT BETWEEN SANDCO LIMITED  
hereinafter referred to “SANDCO” Limited  
AND**

**THE GOVERNMENT OF ANTIGUA AND BARBUDA  
Acting through The Ministry of Agriculture,  
Fisheries, Lands and Housing**

- (1) SANDCO shall rent to the Government the following equipment for the purpose of mining sand by the Government in Barbuda that is to say 1 (one) D-6 bulldozer as well as supply and provide fuel and maintenance for the said equipment at a charge of EC \$8,000.00 (eight thousand dollars E.C.) per month payable monthly at the end of each and every calendar month. This agreement shall commence on the day of February 1993.
- (2) The government shall employ competent operators of the equipment to be approved by SANDCO.
- (3) The period of this agreement is twelve (12) months but maybe terminated by either party giving 7 (seven) days notice in writing.”

It is to be noted that both appendices A and B are signed by Reuben Wolff on behalf of SANDCO and by the

Minister on behalf of the Ministry. Wolff is therefore signing an agreement to do the very thing which the Order enjoined the second and third defendants not to do.

I refer to the other agreements and correspondence in relation to this matter. On 24 February 1993 the Minister wrote to Reuben Wolffe as follows:

“Dear Sir,

Please be advised that Cabinet has made the following decision regarding sand mining at Palmetto Point in Barbuda:

Cabinet after full consideration of the representation made by the Minister authorized the Ministry of Agriculture, Fisheries, Lands and Housing to mine areas of Palmetto Point, Barbuda, for export and for Antigua and Barbuda, until the final determination of the current Law Suit number 456 of 1988 between the Barbuda Council, Plaintiff and the Attorney General, Antigua Aggregates Ltd., and SANDCO Ltd., the defendants. The mining is to be done by the Government, as the lands are by Law vested in the Crown. Cabinet further authorized the Ministry of Agriculture, Fisheries, Lands and Housing to rent equipment from SANDCO Ltd., in order to mine the sand, to sell and deliver the sand to SANDCO Ltd. For three dollars (\$3.00 E.C. ) per cubic yard at the mining site and to authorize SANDCO Ltd. To transport the sand to the processing area, to process the sand, to load it on to vessels and to ship it at SANDCO’s expense.

Cabinet further agreed that the ministry of Agriculture, Fisheries, Lands and Housing, should enter into agreements with SANDCO Ltd. As set out in Appendices ‘A’ and ‘B’ to these minutes. I will look forward to your earliest contact, so that the agreement can be signed and the mining operation begin as quickly as possible (my emphasis).

Yours faithfully,

Sgd: Hon. Hilroy Humphreys  
Minister of Agriculture, Fisheries, Lands  
and Housing

When one analyses this letter from the Minister one is led to the inescapable conclusion that this is not only a gross interference with Order of the Court, but it also challenges the authority of the Court. I consider it to be an affront to the dignity of the Supremacy of the Law.

What the Minister is proposing in that letter and which proposals are being carried out is that the Ministry will mine the sand that is, use the bulldozer and dig up the sand at Palmetto Point, in the very area in which the Order forbids the mining. After the sand is mine, that is dug up it is sold there at that spot to SANDCO who is forbidden by the Order from mining. SANDCO then takes sand transports it and processes it and ships it. In my opinion

the whole business is sinister, it is vile. I must use judicial language which does not allow me to adequately express my disgust at this shameful conduct.

I do not suppose the Honourable Minister knew what he was getting into. Did he have legal advise on the matter? No doubt he did. I shudder to think that a lawyer would actually advise the Minister “to get around the Order of the Court” in that manner, because in my view it was an attempt to do just that.

I refer to yet another agreement between the Minister and SANDCO made 24<sup>th</sup> day of February, 1993 (H.H. 6).

“The parties agree:

- 1) The Government shall sell to SANDCO all sand which the Government will win and mine in Barbuda on and after 24<sup>th</sup> day of February, 1993 at the rate of \$3.00 (three dollars E.C.) per cubic yard, as tabulated per customs export documents for vessels leaving Barbuda, together with monthly fee of \$15,000.00 (fifteen thousand dollars E.C.) to be paid by SANDCO to the Government. The Government undertakes to sell exclusively to SANDCO under these terms a minimum of (10,000.00 (ten thousand) cubic yard per month. No — payments will be payable by SANDCO as SANDCO will not win or mine the sand.
- 2) The Government will pay E.C. \$1,000 per month to a person who will supervise the mining in Barbuda.
- 3) SANDCO shall take delivery of sand from Government at the site, after Government has won and mined the sand. Upon delivery SANDCO shall become the owner of the sand so delivered, and shall thereafter pay all expenses for the removal and/or processing of the said sand.
- 4) For the duration of this agreement SANDCO will continue to benefit from previously made Cabinet Decisions regarding its operations in Barbuda. This will include exemption of all port charges and tonnage dues.
- 5) This agreement shall be for a period of 12 (twelve) month, but may be terminated by either party giving 7 (seven) days notice in writing as it is temporary pending the outcome of Court case 456 of 1988.
- 6) A separate account will be set up through the Ministry of Finance to facilitate payments between the parties.
- 7) This agreement is governed by the Laws of Antigua and Barbuda.

Sgd: Hilroy Humphreys Ministry of Agriculture Fisheries, Lands and Housing	Sgd: Reuben Wolff General Manger SANDCO Ltd.
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Again this agreement seeks to do the very thing which the Court Order forbids the defendants not to do i.e. to win

and mine sand in a designated area at Palmetto Point. Learned Counsel on behalf of the defendants contends that the action of the plaintiff i.e. digging up the sand and stock piling it, constituted winning and mining and that when the defendants took it up, constituted winning and mining and that when the defendants took it up from the stock pile and loaded unto a truck, the winning and mining process had ceased and therefore the Minister would not be aiding and abetting the defendants in mining, because the defendants were not mining, but rather the Government was mining. Even if the defendants’ contention is correct that the Government’s action was winning an mining, their position is untenable because without consulting any authority, Commonsense, in my view, dictates that the winning could not be complete until sand is taken up from the place where it is mined.

Learned Counsel for the defendants referred me to authorities in support of that contention. I now turn to consider some of them.

**STROUD’S JUDICIAL DICTIONARY OF WORDS AND PHRASE FIFTH EDITION**

“When at page 2869 ‘win’ is given the meaning as a covenant to ‘win’ a mineral means prime facie to reach it, and to put it in such a condition that it may be continuously worked in the ordinary way.”

**The Court of Appeal in Rokeby v Elliot (15 Ch. D 279)**

“A coal field is ‘won’ when full practicable, available access is given to the coal hewers so that they may enter on the practical work of getting the coal.”

**Words and Phrases legally defined Second Edition, John B. Saunders.**

“Mine, the word ‘mine’ is not a definite — but is one susceptible of limited or expansion according to the intention with which it is used. The original or primary meaning of the word is an underground excavation made for the purpose of getting minerals. In particular contents, however, the word has been given a number of differing secondary meanings. Thus, it has been interpreted so as to include a place where minerals commonly worked underground are in particular case being worked on the surface, as in certain iron mines and in open cast well working.

**LORD ROKEBY V ELLIOT 1879 13 C.H.D. 277 AT 299**

We think the definition of winning given in the case of **Lewis Fothergill (Law Rep S.C.H. 103)** are as accurate as definition can be of a term like winning which probably is itself as intelligible and plain as any definition can be.

**STROUD JUDICIAL DICTIONARY OF WORDS AND PHRASES 5<sup>TH</sup> EDITION**

'Mine' The primary meaning of the word "mine" standing alone, is an underground excavation made for the purpose of getting minerals.... There the words include the — of the minerals as well as the excavation made to win in."

"Minerals include every substances which can be from underneath the surface of the earth for the purpose of profit" Sand is included."

Mr. Watt Learned Counsel for the plaintiff submitted that the word mining bears a particular legal connotation. It does not only refer to the scraping or excavating of any particular material. It includes all the ancillary and must be taken to arrive at the final marketed product which is intended to be sold or utilized.

Mr. Watt referred to:

**WARATAH GYPSUM PROPRIETARY LTD. V FEDERAL COMMISSIONER OF TAXATION 1964 – 65 112 C.L.R. AT 152**

At page 157 Mc Tiernan J. said:

"The rock gypsum would be fragmented into large but manageable pieces. This loose material is scooped up by the dragline excavator and tipped into waiting railway trucks which carry it to Stenhouse Bay, where it is tipped into a crushing plant and reduced to two and one-half inch screenings. It is then washed to remove salt, clay and other impurities permeating the rock, crushed again to smaller sized screenings and washed again. After that it is stockpiled and allowed to drain for twenty four hours after which it is moved to another stockpile, where it remains for some time to permit the surface moisture on the gypsum to dry. The crushed gypsum is transported from Stenhouse Bay by ship. The ships berth at the jetty and take on the cargo in bulk. The conveyor belt in respect of which a deduction is claimed was erected to carry the gypsum over the half-mile distance between the stockpile at the treatment plant to the jetty.

At page 161 the Learned Judge said:

"There is in my view a sufficient connection between the expenditure on the plant in question and the winning of the gypsum to satisfy the subsection. The railway trucks carry the gypsum from the excavation to the treatment plant and the conveyor belt carried the crushed and washed material from the stockpile to the jetty. The removal of the mined material from the diggings where it is won in its raw state to a plant on the mining property for crushing and washing is an incident of the mining operations and the carriage of the washed and crushed material over the mining

property where it is picked up for transportation to the market is part of the complete mining operations."

Johnny DeSouza at paragraphs 6 & 7 of his affidavit in describing the mining operation said:

6) "...I operated the bulldozer to push off the top soil and bush and to stockpile it for replacement over the mined areas, I then excavated the sand and stockpiled it. The above process is that of winning and mining sand."

7) .... A loader operator employed by SANDCO Limited loaded sand, which had already won and mined by me and stockpiled into trucks operated by SANDCO Limited. SANDCO Limited took delivery of the sand from Government at the site, after Government had won and mined and stockpiled the sand. Truck drivers of SANDCO removed the sand in the said trucks.

Reuben Wolff in giving evidence on 2 April 1993 in the substantive action described the process thus:

"In 1988 sand is mined at Palmetto Point, it was transported to an installation at the river approximately 1 \_ miles away and it is processed at the river. We take the material in a front end loader, drop it into a hopper i.e. on a conveyor belt, conveyor takes it to a screen that is vibrating. Roots, sticks, material that will not go through the screen is removed and the good material drops on another conveyor to be stockpiled into a mound of sand which is ready for exportation from the stockpile. A front end loader puts the material into the trucks which carry it a short distance of about 150 yards and load it on vessels at the dock at the river. From there it is shipped...."

In my opinion the process as described by Wolff must be part of mining process. To use the word of **Mc Fiernan J.** in **WARATAH**, "for crushing and washing is an incident of the mining operations." So too the separation of the roots, sticks and other materials from the sand by means of a vibrator is an incident of the mining operations. To go further as **Mc Tiernan J.** found the carriage of the washed and crushed material from a stockpile to a place adjacent to the property where it is piled up for transportation to market, is part of the complete mining operations. So too in the instant case where the sand is taken from the stockpile, after coming through the vibrator, by the front end loader and is put into loaded onto the vessels is part of the complete mining operations.

It follows therefore that when the sand is dug up by the Ministry of Agriculture etc. that is not an end to the winning and mining operations as the defendants assert. So when the sand is taken up by the employees of SANDCO by front end loaders, onto the trucks and taken to the river to the vibrator for the roots and other impurities to be separated from the sand, the mining process, without any doubt, in my mind continues up to that stage.

A fortiori on 20 April 1993 the third named defendant SANDCO was winning and mining sand. SANDCO is still winning and mining sand to this date in open defiance of the Court's Order of 30 September 1993.

The Minister of Agriculture, Fisheries, Lands and Housing has aided and abetted the third defendants in the breach of the injunction. I find that the Minister of Agriculture was the moving spirit behind the whole breach. As I said he took the matter to Cabinet, he made representations to Cabinet. Paragraph '6' Cabinet minutes of 27 January 1992.

"Cabinet after full consideration of the representations made by the Minister authorized The Ministry of Agriculture, Fisheries, Lands and Housing to mine areas at Palmetto Point."

Of course this Court will never know what representations were made by the Minister, but I come to the inescapable conclusion that the third defendant and not to alleviate the shortage of sand in Antigua and Barbuda occasioned by the order of Court of 30 September 1992.

On 2<sup>nd</sup> April 1993 when Reuben Wolff gave evidence he said:

"Under normal conditions Antigua use 2,500 cubic yards of sand a month, we would export to other destinations 20,000 cubic yards a month, for Barbuda it fluctuates drastically anywhere from 1,000 cubic yards a month to 200 cubic yards a month depending on whether there is a project."

Reuben Wolff was asked this question:

"Would it be economically viable for your company to operate if it were to supply sand only in Antigua and Barbuda?"

His reply was:

"It would be impossible."

From Wolff's own evidence the total consumption of sand in Antigua and Barbuda at its highest is 3,500 cubic yards per month, yet the Minister enters into an agreement (H.H.6) with SANDCO whereby ...the Government undertakes to sell exclusively to SANDCO under these terms, a minimum of 10,000 (ten thousand) cubic yards per month.

Again in my view if the action of the Minister was solely to satisfy a local shortage of sand then SANDCO could have mined sand elsewhere without breaching the Courts Order. But of course to mine anywhere else did not suit SANDCO economically or otherwise. Reuben Wolff in giving evidence on 2 April 1993, he was asked, if Palmetto Point the best place to mine? This was his reply:

"Yes! the best, the sand that is found on Palmetto Point because of the size of the grain of sand it is

the only suitable sand on Barbuda for construction purposes. Our biggest customer Defcon and its subsidiaries throughout the islands will not accept any other sand from Barbuda.

In addition there is The Beach Protection Act Chapter 296 as amended by The Beach Protection (Amendment) Act 1993. If there is a shortage of sand for building purpose in Antigua and Barbuda, a permit can be obtained from the Director of Public Works. The permits the removal of sand from beaches in Antigua and Barbuda which would alleviate the shortage.

This evidence compels me to the view which I have expressed. It also leads me inescapable to the conclusion that the Minister was prepared openly to defy the Order of the Court to assist the third defendant in mining of sand at Palmetto Point.

As I said above the Minister was the driving force behind this sordid affair to and abet the defendant to breach the injunction having taken the matter to the Cabinet, having made representation and having won approval for his scheme, to ensure that his scheme is carried out without any interruption, he then writes to the Commissioner of Police, copied to Inspector Marshall, Barbuda Police. The letter is in the following terms:

"Mr. Edric Potter  
Commissioner of Police  
Police Headquarters  
American Road  
St. Johns  
Antigua

Dear Sir,

Please be advised that on 27 January 1993 Cabinet made a decision that granted the Ministry of Agriculture, Fisheries, Lands and Housing permission to win and mine sand on Palmetto Point in Barbuda and to sell the sand after it is mined at the mine to SANDCO Limited.

As mining will begin in the near future, I would look forward to the support, if necessary of the local Barbuda Police."

A representative will notify the Inspector in Barbuda in advance of the commencement of the operation as to the location of the mining area. I thank you in advance for your co-operation and support.

Yours sincerely,

Sgd: Honourable Hilroy Humphreys  
Minister of Agriculture, Fisheries,  
Lands and Housing.

c.c. Inspector Marshall, Barbuda Police Station.

There is no evidence that this was implemented, that is to say whether police officers were present on site when



mining operations recommenced on 20 April 1993. In my view however, this was an attempt at the vulgar abuse of State power to violate the Order of the Court.

Moreover, McKenzie Frank deposed in his affidavit at paragraph 11:

Since 19 April 1993 armed member of the Antigua and Barbuda Defence Force have been deployed throughout the island of Barbuda and in particular have been deployed at Bumpy well and the Broady area which are close to the sand mining operations.”

Although at paragraph 14 of his affidavit the Honourable Hilroy Humphreys deposed:

“I have no knowledge as to the operations of the Antigua and Barbuda Defence Force.:

It would be idle for me to say that this was a mere coincidence. It could not have been, mining operations were due to commence on 20 April and on 19 April the day before, a contingent of the Defence force is deployed near to the mining area. The whole thing is sinister deposed inter alia as follows:

“On 20 April 1993 I observed that sand was being mined in an area called “The Copse” which is outside the area designated by the plaintiff and referred to in the Order of 30 September 1992. The mining was being done by a bulldozer owned by SANDCO. Knackbill Nedd a Director of the second defendant. Thomas Sharpe the Manager of Operations for the said third defendant and Reuben Wolff Managing Director of the third defendant supervising and overseeing the said mining operations.”

Kackbill Nedd and Reuben Wolff said in their affidavits that they were not supervising or overseeing the operations. It is without a doubt that they were present as Frank said. The question is what were they doing there at the time the sand was being mined. It is obvious they were not there as mere spectators, Reuben Wolff is a Director and General Manager of the third defendant, Kackbill Nedd is a Managing Director of the third defendant. Quite apart, I have found that the third defendant was in breach of the Order of the 30 September 1992. Consequently Knackbill Nedd and Rueben Wolff are in breach of the Order of 30 September 1992. Apart from that their presence at the mining site o 20 April 1993. I find that they were present there supervising and directing operations. They have in their own persons breached the Order of the Court of 30 September 1992.

Kackbill Nedd in his affidavit paragraph 4 deposed as follows:

“I have on occasions in the absence of other operators, operated a front end loader in order to load sand which had been already won and mined

and stockpiled and sold to the third defendants onto trucks operated by the third defendant, to be removed from the site.”

Having regard to what I have decided above in relation to what constitutes mining of sand, Kackbill Nedd was actively and openly engaged in the breach of the Order of 30 September 1992. At paragraph 10 Reuben Wolff’s affidavit he deposed:

“As a result of the agreement between the said Ministry and Johnny DeSouza on behalf of SANDCO Limited, I terminated the contract of employment of Johnny DeSouza with SANDCO by letter dated March 19 1993, effective 20 April 1993.”

The First observation I make is this, as the termination of Johnny DeSouza’s employment was effective from 20 April 1993, it means that the 20 April 1993 legally he was employed by the third named defendant. Consequently Johnny DeSouza was not winning and mining sand fort he Government, but for the third defendant. The third defendant was therefore on 20 April 1993 in breach of the Order of 30 September 1992. I now reproduce hereunder a copy of the letter of Agreement with Johnny DeSouza:

“Dear Sir,

I hereby agree to win and mine sand and backfill areas mined with equipment provided by the Central Government of Antigua and Barbuda for a fixed amount of E.C. \$250.00 per month or part thereof. Payment will be due and payable end of each month. The Government will provide one D-6 bulldozer including fuel and maintenance to carry out the mining of the sand.

I will win and mine sand in areas specified by a Government representative.

I am acting as an independent contractor and will be responsible for my own Social Security and Medical Benefits payments.

If for some reason I am unable to perform such work, I will provide other personnel to do the same.

Either party may cancel this agreement by given the other party seven (7) days written notice in advance of date of intended cancellation.

Please indicate your agreement to these terms by signing both copies of this letter and returning one copy to me.

Sgd: Johnny DeSouza      Sgd: Hilroy Humphreys  
Minister of Agriculture,  
Lands, Fisheries and  
Housing

Dated 15 March 1993”

It is in my view that the Minister who was the driving force behind this must have put his head together with Reuben Wolff to come up with this scheme. Reuben Wolff

says in his affidavit that as a result of that agreement between DeSouza and the Government, he terminated the employment of DeSouza. If there was a termination, it was a sham, it is one of convenience in my opinion.

One may very well ask was there a rental of the D-6 tractor, one may very well wonder, if in fact there was a rental of the said bulldozer,. Why the need to have masqueraded on the back of the bulldozer those words **“RENTED TO THE MINISTRY OF AGRICULTURE, FISHERIES, LANDS AND HOUSING?”**

The Government is not in the business of sand mining. One must ask why did the Minister of Agriculture got involved in this? This has nothing to do with Agriculture. From the evidence, I am of the view that Johnny DeSouza is an experienced man in this line of work, the Minister therefore need someone to fit into his scheme. Johnny DeSouza was therefore the right person. I have no doubt in my mind that if the substantive action were to be resolved in favour of the defendants, Johnny DeSouza will be back working for the third named defendant.

Learned Counsel for the defendants submitted that the plaintiff will have to establish beyond doubt that the defendants have breached the Order, but also the mens rea that is to say, that the defendants knew that they were breaching the Order and that they intended to do so.

I first of all look at Minister Humphreys’ position in light of the evidence which has been led on the affidavits. It is in my view that not only did the Honourable Minister know about the Order of 30 September 1992, which he admitted knowing of in his affidavit, but in order for him to devise the scheme which he did, in order to try to get around the injunction, he had to put a lot of effort and thought into doing so. In other words he may have deemed it an ingenious plan on his part to avoid the Order. For instance in his affidavit he kept referring to the fact that no injunction was granted against the Crown and that the lands were vested in the Crown and according to Minister Huimphreys that gave him the right to win and mine sand. Clearly the mens rea is established.

In relation to Reuben Wolff, he knew of the injunction, he knew of the terms of the Order, which forbade him or his company from winning and mining sand outside of the boundaries at Palmetto Point. He entered into a number of agreements with Mr. Humphreys for the Minister to do the very thing which he is enjoined from doing.

On 20 April 1993 when mining under the ageis of the Ministry of Agriculture, Fisheries, Lands and Housing, he was there supervising operations, supervising the very thing he is ordered not to do by the Court. The mens rea is well established in relation to this defendant, so too in relation to Kackbill Nedd as he was doing the very acts which Reuben Wolff was enjoined on the 20 April 1993. What is more Kackbill Nedd on occasions after 20 April

1993 operated and involved in the mining operations at Palmetto Point. McKenzie Frank said in his affidavit at paragraph 9:

“I have on a number of occasions subsequent to 20 April 1993 to the present witnessed the said Knackbill Nedd operating a front end loader owned by SANDCO, loading sand previously mined onto trucks owned by Antigua Aggregates Limited and or SANDCO Limited which said trucks were driven to the wharf at the river and loaded onto barges for shipment.”

Knackbill Nedd deposed b his affidavit at paragraph 4 in part as follows:

“As to paragraph 9 of the said affidavit of Mckenzie Frank, I have on occasions in the absence of other operators, operated a front end loader in order to load sand which had already been won and mined and stockpiled and sold to the third defendant onto trucks operated by the third defendant, to be removed from the site.”

Clearly in my view that established beyond a shadow of a doubt the mens rea of this defendant. He knew that he was doing what the Order forbade him not to do and he intended so to do. What is more, he was doing so with the defendant’s equipment. The Order is that the second and third defendants by themselves their servants or agents or otherwise be restrained by injunction from winning and mining sand. As North J. said in Seaward case (referred to above) at page 1129:

“The words servants and agents are, I think, used, not as describing a particular class of persons, but as describing any person who act as servants or agents or assistants of the persons restrained in committing the act. The commission of which is restricted.”

So too in my view the word “otherwise” is used so as to prevent anyone from achieving the same result he would have achieving the same result he would have achieved had he acted through a servant or agent. For example if a mechanical instrument is used to obtain the same result that a result that a servant would, that would be the “otherwise”

In my view therefore when Kackbill Nedd uses the defendants front end loader to do the mining, he was by himself in breach of the Order and also in breach of the Order by the use of the defendant’s front end loader.

**IN A.G. v NEWSPAPER PUBLISHING PL.C 1987 ALL E.R. at 304** Donaldson M.R. said:

“I am quite satisfied that what is contemplated is the power of the Court to commit for contempt where the conduct complained of is specifically intended to impede or prejudice the administration of justice. Such an intent need not be expressly

avowed or admitted but can be inferred from all the circumstances, including the foreseeability of the consequences of the conduct. Nor need it be the sole intention of the contemnor. An intent is to be distinguished from motive or desire.”

At page 310 Lloyd L. J. said:

“I would therefore hold that the mens rea required in the present case is an intent to interfere with the course of justice. As in other breaches of the Criminal Law, that intent may exist, even though there is no desire to interfere with the course of justice. Nor need it be the sole intent. It may be inferred, if even though there is no overt proof. The more obvious the interference with the course of justice, the more readily will the requisite intent be inferred.”

In the instant case there could be no grave interference with the course of justice on the part of all three defendants particularly Minister Humpherys.

I turn now to consider the question of service and the endorsement of the penal clause on the Order. Mr. Collins contended that the Order, when it was served it was perfected. The Order was made on 30 September 1992 and according to Mr. Collins it was served on the second and third defendants on 1<sup>st</sup> October, 1992. When it was filed and served it was not endorsed with the penal clause. The Order with its penal clause endorsed was served on the defendants on 18 May 1993. Learned Counsel submitted that the Order having been filed, served and perfected, if the plaintiffs wanted to serve a proper Order on the defendants, they had to go back to the Court regularize the position.

Learned Counsel referred to the following authorities among others:

**ATKINS ENCYCLOPEDIA OF COURT FORMS IN CIVIL PROCEEDINGS SECOND EDITION AT PAGE 188 IT IS STATED:**

“A penal notice must be indorsed on the copy served warning of the consequences of neglecting to obey within the time limited, or in the case of an Order to abstain from doing an act disobeying the Order and with the copy judgement in order, there must also be served a copy of any Order made extending or abridging the time limit, and, when the judgement or Order served, filed a time limit in respect of an earlier judgement or Order which specified a different time limit or which did not specify a time limit at all. A copy of the earlier judgement must be served.”

The Supreme Court Practice 1988 Vol. 1 Order 45/7/7. An Order of committal of a person for disobedience to an Order requiring him to do a given act within a given time will not be directed unless a copy of the Order with a proper endorsement has been personally served upon him in due time or unless he has had notice of the Order and is evading

service thereof. The fact the person was present in court when the Order was made is not sufficient to dispense with service of the Order.

**IN RE TUCK MURCH V LOOSEMORE 1906 1 C.H.D 692**

The headnote reads:

“A Writ of Sequestration will not usually be issued against a trustee for disobedience of an Order directing him to pay money into Court unless the Order has been personally served upon him. The fact that the Order was by consent and that he was in Court when it was made and initialed on one of the briefs will not make personal service unnecessary, unless it is shown that he is evading service.

**HAPDEN V WALLIS (1884) 26 CHD 746**

The headnote reads in part:

“Order XII, rule 5, which requires any Order to bear an endorsement warning the party bound by it of the consequences of disobedience, applies to an Order for discovery of documents of which service on the Solicitor is permitted. An writ of attachment cannot be issued against a person who disobeys such an Order unless the copy served on his Solicitor bore the required endorsement.”

Mr. Watt submitted that as a matter of Law the penal clause is not a part of the Order of Court. The rule 66 order does not speak of filing the Order with the endorsement. All that is required is that you must serve the party with the endorsement, so argued Mr. Watt. I agree entirely with — argument.

In my judgement before the defendant can be attached, “A penal Notice must be endorsed on the copy served, warning of the consequences of neglecting to obey within the time limited or in the case of an Order to abstain from doing an act, disobeying the Order.”

The plaintiff is saying in the instant case that the defendant breached the injunction on 20 April 1993, the Order of the Court is that they should refrain from winning and mining sand until, or after the trial of the substantive action or until further Order. The substantive matter has not been determined and there has been no order setting aside or varying the Order. The time therefore limited for abstaining from doing that act has not yet passed. The defendants were served with a copy of the Order with the penal clause on 18 May 1993. From the affidavit evidence the defendants to this present time at the hearing of the motion are mining. In my view therefore the plaintiff has complied with the requirement of service of the penal Order.

In my judgment this is the most serious interference with the administration of the Law. It is a direct challenge to

the supremacy of the Law coming from a Minister of Government, a person who holds high office in the land. As **A.L. Smith L.J.** said in **SEAWARD** case at page 1333.

“There could not have been two more flagrant and contumacious breaches than those which are proved by evidence to have taken place on those dates.”

In my opinion the breaches in the instant case are far more serious than those which were found to exist in the **SEAWARD** case. I have not personally come across anything as serious, flagrant and direct as this. I have dealt with cases where for instance an Order is made against a recalcitrant husband to pay maintenance to his estranged wife and that Order has not been complied with. This Court has always been firm in instances like those. These cases in my view are nowhere as serious as the present, because I do not view them as a direct challenge to the authority of the Law as the instant case. They may be stupid resistance disobedience or to put it at its highest disregard of the Order of the Court.

If the rule of Law is to survive the quintessence of which is that everyone, regardless of his station in life, is equal before the Law and I shall never preside over its demise, then the Court must be firm with those contemnors.

We in this part of the hemisphere must decide, must make up our minds, whether we want the Courts or not. In my view the Court is last bastion in any civilized society. It is the institution everyone turns to in the final analysis. If the answer to that question is in the affirmative then, it behooves everyone to respect its authority. It cannot and it must not be an institution to be used and abused. If the answer to the question is in the negative then we must be firm about that, because in my personal view it is far worse to have an institution which is not respected than not to have that institution at all.

#### **IN M v HOME OFFICE 1992 4 ALL ER 97**

**Lord Donaldson M.R.** at page 139 said:

“In the circumstances of this I do not consider that it is necessary by the imposition of any penalty other than in respect of costs to assert or emphasize the paramount authority of the Law, and the Courts as the constitutional administrators and enforcers of that Law. Although I would make an order for costs to be payable by Mr. Baker personally, it does not follow from this that he is not entitled to be indemnified out of public moneys as at all times and in all respects he was acting as Minister. Whether he shall be so indemnified is a matter for others. Different considerations might well arise if, in a different fact a Court considered it appropriate to impose a fine and the Minister or Civil Servant sought an indemnity in respect of the penalty.”

Of course in the instant case different considerations must arise. The facts in the instant case are vastly different from that in M’s case. In the latter case the contempt action arose out of an undertaking given by Counsel at 5:55 p.m. to the Court that the **Home Office** would not send **M** out of the jurisdiction before the Court dealt with **M** political asylum in Britain.

Counsel had no express instructions to give such undertaking and did not intend to do so with the result that the fact that an undertaking had been given was not immediately communicated to the **Home Office**. **M** was placed on board a flight to Zaire via Paris which took off at 6.47 p.m. During the flight to Paris the **Home Office** became aware of the Judge’s wish that the applicant’s removal be deferred. The Chief Immigration Officer had meanwhile been informed of the undertaking given by Counsel but did not pass that knowledge on to the **Home Office** and the Minister to whom the matter had been referred decided to take no action to interrupt **M**’s onward flight as he was under the impression that the Judge had merely made an informal request to defer the applicants removal and that the Crown was under no formal commitment to do so. Later that evening while **M** was en route to Zaire from Paris the Judge issued a mandatory order at 11:20 p.m. that the Secretary of State procure the return of **M** to the jurisdiction of the Court. The Order was immediately faxed to the Home Office, but no action was taken and the next day after taking legal advice the Secretary of State decided to challenge the Order and to withhold action to return the applicant from Zaire. In the meantime at a hearing of an application by the Secretary of State to discharge the Judge’s mandatory Order. The Judge, after hearing argument, held that he had no jurisdiction to make the Order and he therefore discharged it. Proceedings were then brought on behalf of **M** against the Home Office and the Secretary of State for Contempt of Court in failing to comply with the undertaking.

The contempt proceedings arose in the above case, to begin with as a result of a misunderstanding on the part of the Minister and of his not being aware of the undertaking given by Counsel.

Indeed **Lord Donaldson** at page 138 had this to say:

“A contempt of Court is a matter of the utmost seriousness, but culpability of the Contemnor can vary enormously. In the highly unusual circumstances of this case. Mr. Baker’s culpability falls at the lower end of the scale for the following reasons (1) He had no advance knowledge of **M**’s case or of the Court’s Order before 4.00 p.m. on 2<sup>nd</sup> May. (2) He had very little time in which to decide upon his course of action. (3) He has advised wrongly, that the Court’s Order was made without jurisdiction and may have got the impression that it could be treated as nullity. (4) Whether or not his advisers intended it. I think

that he was left with the impression that he could properly delay action in compliance with the Order until after the Judge had decided whether or not to rescind it and that the cancellation of the return flight should be viewed as part of the decision by Mr. Baker to postpone action rather than to decline to take it. (5) His decision was expressly made subject to my advice which might be given by the Treasury Counsel. (6) He has discovered any intention to act in defiance of an Order of the Court or to hold himself above the Law, a disavowal which I fully accept. (7) He has expressed sincere regret if he acted wrongly, as undoubtedly he did.”

On the other had in the instant case, the Minister’s culpability falls at the very upper end of the scale. As in my view he deliberately set about to aid and abet the defendants to breach the Order of the Court. He did so solely to assist the defendants who stood to gain quite a lot financially by the breach of the said Order of Court. The Minster in my view felt he had the authority, power to ride rough shod over the Order of Court.

The Minister of Agriculture has shown absolutely no regret for his actions, neither have the other contemnors. As I have said in the face of this action by the plaintiffs, the defendants continue to mine sand in the area which the Court forbids them to mine. This surely cannot be anything but a total lack of respect and disregard for the Law.

In the face of such challenge to the supremacy of the Law, what is the Court to do. I have thought long and hard about this, I have agonized about it.

“There are three real sensations for contempt of Court - imprisonment, a fine and sequestration of assets.” (per Lord Donaldson P. 135 M v Home Office)

In my opinion a fine would not be adequate punishment in this case. I have taken the view that the defendants must know that their action is wrong or at least have the suspicion

that it is yet, they go on mining the sand in the prohibited area. They must have taken the decision that because of the huge profits which they make from sand mining operations to go ahead with he mining inspite of the Court order and even if the Court were to find them guilty of contempt, they would be able to pay any fine and still end up with a huge profit. In the circumstance therefore a fine cannot be regarded as any punishment to the contemnors. Neither do I regard sequestration of property.

In my judgement the most appropriate way in which this Court can demonstrate its disgust at the conduct of these contemnors fo their total disrespect for and challenge to the authority of the Law and their interference with the administration of the Law is by the imposition of a custodial sentence on each of these contemnors.

**In Seward v Patterson**

Where, as I have said the contempt was nowhere as serious as in the instant case, the two principal contemnors were sent to prison for one month each for their contempt.

In light of the foregoing Hilroy Humphreys is restrained by injunction whether by themselves, their Servants, Agents from mining, winning or removing sand outside the boundaries of the area at Palmetto Point Barbuda, established by the plaintiff and designated by public signs and notices until after trial of the action of 456/86 until further order.

Costs of this action fit for two Counsel to be paid to he plaintiffs by all three defendants to be taxed.

.....  
 Albert J. Redhead  
 Puisne Judge



## ***IV***

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# ***Burden of Proof***

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[HOUSE OF LORDS]

**ENVIRONMENT AGENCY (FORMERLY  
NATIONAL RIVERS AUTHORITY)**

**RESPONDENT**

**AND**

**EMPRESS CAR CO. (ABERTILLERY) LTD.**

**APPELLANT**

1997 Nov. 18; Lord Browne-Wilkinson, Lord Lloyd of Berwieck, Lord  
1998 Feb. 5 Nolan, Lord Hoffman and Lord Clyde

*Public Health - Pollution, control of - Causing polluting matter to enter controlled waters - Escape of diesel oil from tank - Owner of tank failing to fit lock to tap and fitting extension pipe to bypass bund intended to contain spillage - Unknown person opening tap - Whether owner of tank liable for causing pollution - Water Resources Act 1991 (c. 57) m s, 85(1)*

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The appellant maintained a diesel tank in a yard which was drained directly into a river. The tank was surrounded by a bund to contain spillage, but the appellant had overridden that protection by fixing an extension pipe to the outlet of the tank so as to connect it to a drum standing outside the bund. The outlet from the tank was governed by a tap which had no lock. On 20 March 1995 the tap was opened by a person unknown and the entire contents ran into the drum, overflowed into the drum, overflowed into the yard and passed down the drain into the river. The appellant was charged with causing polluting matter to enter controlled waters contrary to section 85(1) of the Water Resources Act 1991<sup>1</sup>. The justices convicted the appellant, and the Crown Court and the Divisional

Court of the Queen's Bench Division dismissed an appeal against conviction.

On appeal by the appellant:-

Held, dismissing the appeal, that on a prosecution for causing pollution under section 85(1) of the Water Resources Act 1991 it was necessary to identify what the defendant was alleged to have done to cause the pollution; that the prosecution need not prove that the defendant did something which was the immediate cause of the pollution; that when the prosecution had identified some act done by the defendant the justices had to decide whether it caused the pollution; that if a necessary additional condition of the actual escape was the act of a third party or a natural event, the justices should consider whether that act or event should be regarded as a matter of ordinary occurrence, which would not negative the effect of the defendant's act, or something extraordinary, leaving open a finding that the defendant did not cause the pollution; that the distinction between ordinary and extraordinary was one of the fact and degree to which the justices had to apply their commonsense of what occurred in the locality; e.g., and that accordingly, applying the foregoing principles, there was ample evidence on which the Crown Court had been entitled to find that the appellant had caused the pollution (post, pp. 352E-G, 362A-F).

*Alphacell Ltd. v. Woodward* (1972) A.C. 824, H.L. (E.) and *National Rivers Authority v. Yorkshire Water Services Ltd.* (1995) 1 A.C. 444, H.L. (E.) considered.

*Price v. Cromack* (1975) 1 W.L.R. 988, D.C.; *Wychavon District Council v. National Rivers Authority* (1993) 1 W.L.R. 125, D.C. and *National Rivers Authority v. Wright Engineering Co. Ltd.* (1994) 4 All E.R. 281 disapproved.

*Impress (Worcester) Ltd. v. Rees* (1971) 2 All E.R. 357, D.C. overruled. Decision of the Divisional Court of the Queen's Bench Division affirmed.

The following cases are referred to in their Lordships' opinions:

*Alphacell Ltd. v. Woodward* (1972) A.C. 824; (1972) 2 W.L.R. 1320; (1972) 2 All E.R. 475, H.L.(E)

*Attorney-General's Reference* (No. 1 of 1994) (1995) 1 W.L.R. 599; (1995) 2 All E.R. 1007, C.A.

*C.P.C. (U.K.) Ltd. v National Rivers Authority* (1995) Env. L.R. 131, C.A.

*Fiona, The* (1994) 2 Lloyd's Rep. 506, C.A.

*Impress (Worcester) Ltd. v. Rees* 1971) 2 All E.R. 357, D.C.

*Lockhart v. National Authority Coal Board*, 1981 S.L.T. 161

*National Rivers Authority v. Wright Engineering Co. Ltd.* (1994) 4 All E.R. 281

*National Rivers Authority v. Yorkshire Water Services Ltd.* (1995) 1 A.C. 444; (1994) 3 W.L.R. 1202; (1995) 1 All E.R. 225, H.L.(E.)

*Price v. Cromack* (1975) 1 W.L.R. 988; (1975) 2 All E.R. 113, D.C.

*Stansbie v. Troman* (1948) 2 K.B. 48, C.A.

*Weld-Blundell v. Stephens* (1920) A.C. 956, H.L.(E.)

*Welsh Water Authority v. Williams Motors (Cwmdu) Ltd.*, *The Times*, 5 November 199, D.C.

*Wychavon District Council v. National Rivers Authority* (1993) 1 W.L.R. 125; (1993) 2 All E.R. 440, D.C.

The following additional cases were cited in argument:

*Cambridge Water Co. v. Eastern Counties Leather Plc.* (1994) 2 A.C. 264; (1994) 2 W.L.R. 53; (1994) 1 All E.R. 53, H.L. (E.)

*Crawford v. Allen* (1984) V.R. 402

*Reg. v. City of Sault Ste. Marie* (1978) 85 D.L.R. (3d) 161

APPEAL from the Divisional Court of the Queen's Bench Division.

This was an appeal by leave dated 3 June 1997 of the House of Lords (Lord Mustill, Lord Nolan and Lord Steyn) by the appellant, *Empress Car Co. (Albertillery) Ltd.*, form

<sup>1</sup> Water Resources Act 1991, s. 85(1): see post, p. 353A.

the judgment dated 11 December 1996 of the Divisional Court of the Queen's Bench Division (Schiemann L.J. and Butterfield J.) dismissing its appeal by way of case stated from the judgement dated 12 January 1996 of the Crown Court at Newport, Gwent (Judge Crowther Q.C. and justices). That judgement upheld the conviction on 23 November 1995 of the appellant by Tredegar justices sitting at Abertillery Magistrates' Court on an information preferred by the National Rivers Authority, the predecessor of the present respondent, The Environment Agency, that the appellant had caused polluting matter, namely, diesel oil, to enter controlled waters, contrary to section 85(1) of the Water Resources Act 1991.

The Divisional Court refused leave to appeal but certified pursuant to section 1(2) of the Administration of Justice Act 1960 that a point of law of general public importance was involved in its decision, namely, whether a person could be convicted of an offence under section 85(1) of the Water Resources Act 1991 of causing polluting matter to enter controlled waters if it was proved that: (a) he held polluting matter and contained it in such a way as it would not escape but for a positive act by himself or another; and (b) he failed to take reasonable precautions to prevent such an escape occurring as a result of an action by a third party; and it was not proved that he took any other actions which resulted in the pollution.

The facts are stated in the opinion of Lord Hoffman.

*Frederick Philpott and Jonathan Goulding* for the appellant  
*Nigel Plemming Q.C. and Mark Bailey* for the respondent

Their Lordships took time for consideration

5 February 1988. LORD BROWNE-WILKINSON. My Lords, I have the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Hoffmann. For the reasons he gives I would dismiss the appeal.

LORD LLOYD OF BERWICK. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. For reasons he has given I, too, would dismiss this appeal.

LORD HOFFMANN. My Lords, Empress Car Co. (Abertillery) Ltd. ("the company") was convicted at the Crown Court sitting at Newport, Gwent (Judge Crowther Q.C. and two justices) of "causing poisonous, noxious or polluting matter or solid waste to enter controlled waters" contrary to section 85(1) of the Water Resources Act 1991. "Controlled waters" are defined in section 104(1)(c) and (3) to include any river and in this case were the waters of the River Ebbw Fach, which ran close by the company's premises in Abertillery. A large quantity of diesel oil had escaped from a tank into the river in circumstance which I shall shortly describe. Section 85(1) reads as follows:

"A person contravenes this section if he causes or knowingly permits any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters."

The company was originally convicted by the Tredegar justices and appealed to the Crown Court. Its appeal from the Crown Court to the Divisional Court by way of case stated was also dismissed. It now appeals to your Lordships' House.

The facts as found in the case stated may be summarised as follows. The company maintained a diesel tank in a yard which was drained directly into the river. The tank surrounded by a bund to contain spillage, but the company had overridden this protection by fixing an extension pipe to the outlet of the tank so as to connect it to a drum standing outside the bund. It appears to have been more convenient to draw oil from the drum than directly from the tank. The outlet from the tank was governed by a tap which had no lock. On 20 March 1995 the tap was opened by a person unknown and the entire contents of the tank ran into the drum, overflowed into the yard and passed down the drain into the river.

The Crown Court found that there was a history of local opposition to the company's business. The tap might have been turned on by a malicious intruder, an aggrieved visitor or an upset local person. The incident coincided with a public inquiry about a disputed footpath which was to be held on the following day. But the court made no finding as to the identity of the person who turned on the tap. The evidence was consistent with it having been an employee or a stranger. The court held that it did not matter because on either view the company had "caused" the oil to enter the river. In the case stated, the court gave the following reasons:

"8. . . . The appellant had brought the oil onto the site and put it in a tank with wholly inadequate arrangements for withdrawal - outside the bund. We had regard to the nature and position of the bund, the inability of the tap to be locked and the inadequacy of the bund to contain overflow in the circumstances which happened, whether they were deliberate or negligent or careless.

"9. The appellant should have foreseen that interference with their plant and equipment was an ever-present possibility, and they failed to take the simple precaution of putting on a proper lock and a proper bund and this was a significant cause of the escape even if the major cause was third party interference."

The company's case before the Divisional Court was that if the evidence was consistent with the tap having been opened by a stranger, it should have been acquitted. The escape would have been caused by the stranger and not the company. The Divisional Court disagreed, saying that

although it would be true to say that the escape had been caused by the stranger, it was open to the Crown Court to find that it had also been caused by the company. But they said that the authorities on the subject were not easy to reconcile and certified the following question of general public importance.

“Whether a person can be convicted of an offence under section 85(1) of the Water Resources Act 1991 of causing polluting matter to enter controlled waters if it is proved that - (a) he held the polluting matter and contained it in such a way as it would not escape but for a positive act by himself or another; and (b) he failed to take reasonable precautions to prevent such an escape occurring as a result of an action by a third party; and it is not proved that he took any other actions which resulted in the pollution.”

Before your Lordships, Mr. Philpott for the company repeated his submission that the cause of the escape was not the keeping of the oil by the company but the opening of the tap by the stranger. He also said that “causing” for the purposes of section 85(1) required some positive act and that the escape could not be said to have been caused by any such act by the company. All it had done was to create a state of affairs in which someone else could cause the oil to escape. There are accordingly two issues in the case. The first is whether there has to have been some “positive act” by the company and, if so, whether the company did such an act. The second is whether what it did “caused” the oil to enter the river.

### 1. Acts and omissions

My Lords, the two limbs of section 2(1)(a) of the Rivers (Prevention of Pollution) Act 1951, which was in the same terms as section 85(1) of the Act of 1991, were analysed by Lord Wilberforce in *Alphacell Ltd. v. Woodward* (1972) A.C. 824, 834:

“The subsection evidently contemplates two things - *causing*, which must involve some active operation or chain of operations involving as a result the pollution of the stream; *knowingly permitting*, which involves a failure to prevent the pollution, which failure, however, must be accompanied by knowledge.”

Putting the matter shortly, if the charge is “causing,” the prosecution must prove that the pollution was caused by something which the defendant did, rather than merely failed to prevent. It is, however, very important to notice that this requirement is not because of anything inherent in the notion of “causing.” It is because of the structure of the subsection which imposes liability under two separate heads: the first limb simply for doing something which causes the pollution and the second for knowingly failing to prevent the pollution. The notion of causing is present in both limbs: under the first limb, what the defendant did must have caused the pollution and under the second limb,

his omission must have caused it. The distinction in section 85(1) between acts and omissions is entirely due to the fact that parliament has added the requirement of knowledge when the cause of the pollution is an omission. Liability under the first limb, without proof of knowledge, therefore requires that the defendant must have done something.

In this sense, Mr. Philpott is right in saying that there must have been some “positive act” by the company. But what counts as a positive act? We were referred to two cases in which the defendant’s conduct had been held to be insufficient. In *Price v. Cromack* (1975) 1 W.L.R. 988 the defendant maintained two lagoons on his land into which, pursuant to an agreement, the owners of adjoining land discharged effluent. The lagoons developed leaks which allowed the effluent to escape into the river. Lord Widgery C.J. said that the escape had not been caused by anything which the defendant had done. There was no “positive act” on his part. The effluent came onto the land by gravity and found its way into the stream by gravity “with no act on his part whatever.” see p. 994. The other case is *Wychavon District Council v. National Rivers Authority* (1993) 1 W.L.R. 125. The council maintained the sewage system in its district as agent for the statutory authority, the Severn Trent Water Authority. It operated, maintained and repaired the sewers. As sewage authority, it received raw sewage into its sewers. On the occasion in question one of the sewers became blocked. The sewage flowed into the storm water drainage system and into the River Avon. The Divisional Court held that the council had not done any positive act which caused pollution. If it had known of the blockage it might have been liable for “knowingly permitting” but it could not be liable for causing.

My Lords, in my opinion these two cases take far too restrictive a view of the requirement that the defendant must have done something. They seem to require that his positive act should have been in some sense the immediate cause of the escape. But the Act contains no such requirement. It only requires a finding that something which the defendant did caused the pollution. I shall come later to the question of what amounts to causing. Assuming, for the moment, that there was a sufficient causal connection between the maintaining of the lagoons in *Price v. Cromack* or the operation of the sewage system in *Wychavon District Council v. National Rivers Authority* and the respective escapes, I do not see why the justices were not entitled to say that the pollution was caused by something which the defendants did. Maintaining lagoons of effluent or operating the municipal sewage system is doing something.

In *National Rivers Authority v. Yorkshire Water Services Ltd.* (1995) 1 A.C. 444 the House was invited to say that the law had “taken a wrong turning” in the requirement of a “positive act” as formulated in *Price v. Cromack* and *Wychavon District Council v. National Rivers Authority*. Lord Mackay of Clashfern L.C., at p. 452, said that he

regarded those cases as turning on their own facts but added that the word “cause” should be used in its ordinary sense and that “it is not right as a matter of law to add further requirements.” In *Attorney-General* fuel. Maintaining a tank of diesel is doing something and therefore, provided that it was open to the court to find the necessary causal connection established, they were in my view entitled to convict. It is to the notion of causing that I therefore now turn.

## 2. Causing

The courts have repeatedly said that the notion of “causing” is one of common sense. So in *Alphacell Ltd. v. Woodward* (1972) A.C. 824, 847 Lord Salmon said:

“what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than by abstract metaphysical theory.”

I doubt whether the use of abstract metaphysical theory has ever had much serious support and I certainly agree that the notion of causation should not be overcomplicated. Neither, however, should it be oversimplified. In the *Alphacell* case, at p. 834, Lord Wilberforce said in similar vein:

“In my opinion, ‘causing’ here must be given a common sense meaning and I deprecate the introduction of refinements, such as *causa causans*, effective cause or *novus actus*. There may be difficulties where acts of third persons or natural forces are concerned ...”

The last concession was prudently made, because it is of course the causal significance of acts of third parties (as in this case) or natural forces that gives rise to almost all the problems about the notion of “causing” and drives judges to take refuge in metaphor or Latin. I therefore propose to concentrate upon the way common sense notions of causation treat the intervention of third parties or natural forces. The principles involved are not complicated or difficult to understand, but they do in my opinion call for some explanation. It is remarkable how many cases there are under this Act in which justices have attempted to apply common sense and found themselves reversed by the Divisional Court for error of law. More guidance is, I think, necessary.

The first point to emphasise is that common sense answers to questions of causation will differ according to the purpose for which the question is asked. Questions of causation often arise for the purpose of attributing responsibility to someone, for example, so as to blame him for something which has happened or to make him guilty of an offence or liable in damages. In such cases, the answer will depend upon the rule by which responsibility is being attributed. Take, for example, the case of the man who forgets to take the radio out of his car and during the night

someone breaks the quarterlight, enters the car and steals it. What caused the damage? If the thief is on trial, so that the question is whether he is criminally responsible, then obviously the answer is that he caused the damage. It is no answer for him to say that it was caused by the owner carelessly leaving the radio inside. On the other hand, the owner’s wife, irritated at the third such occurrence in a year, might well say that it was his fault. In the context of an inquiry into the owner’s blame worthiness under a non-legal, commonsense duty to take reasonable care of one’s own possessions, one would say that his carelessness caused the loss of the radio.

Not only may there be different answers to questions about causation when attributing responsibility to different people under different rules (in the above example, criminal responsibility of the thief, commonsense responsibility of the owner) but there may be different answers when attributing responsibility to different people under the same rule. In *National Rivers Authority v. Yorkshire Water Services Ltd.* (1995) 1 A.C. 444 the defendant was a sewerage undertaker. It received sewage, treated it in filter beds and discharged the treated liquid into the river. One night someone unlawfully discharged a solvent called iso-octanol into the sewer. It passed through the sewage works and entered the river. The question was whether the defendant had caused the consequent pollution. Lord Mackay of Clashfern L.C., with whom the other members of the House agreed, said, at p. 452:

“... I am of opinion that Yorkshire Water Services having set up a system for gathering effluent into their sewers and thence into their sewerage works there to be treated, with an arrangement deliberately intended to carry the results of that treatment into controlled waters, the special circumstances surrounding the entry of iso-octanol into their sewers and works does not preclude the conclusion that Yorkshire Water Services caused the resulting poisonous, noxious and polluting matter to enter the controlled waters, notwithstanding that the constitution of the effluent so entering was affected by the presence of iso-octanol.”

So in the context of attributing responsibility to Yorkshire Water Services under section 85(1) (then section 107(1)(a) of the Water Act 1989), it had caused the pollution. On the other hand, if the person who put the iso-octanol into the sewer had been prosecuted under the same subsection, it would undoubtedly have been held that he caused the pollution.

What these examples show is that it is wrong and distracting, in the case of a prosecution under section 85(1), to ask “What caused the pollution?” There may be a number of correct answers to a question put in those terms. The only question which has to be asked for the purposes of section 85(1) is “Did the defendant cause the pollution?” The fact that for different purposes or even for the same purposes one could also say that someone or something

else caused the pollution is not inconsistent with the defendant having caused it. The way Lord Wilberforce put it in *Alphacell Ltd. v. Woodward* (1972) A.C. 824, 835 was as follows:

“rather than say that the actions of the appellants were a *cause* of the pollution I think it more accurate to say that the appellants caused the polluting matter to enter the stream.”

I turn next to the question of third parties and natural forces. In answering questions of causation for the purposes of holding someone responsible, both the law and common sense normally attach great significance to deliberate human acts and extraordinary natural events. A factory owner carelessly ignited. If a workman, thinking it is only an empty drum, throws in a cigarette butt and causes an explosion, one would have no difficulty in saying that he had caused the explosion. On the other hand, if the workman, knowing exactly what the drum contains, lights a match and ignites it, one would have equally little difficulty in saying that he had caused the explosion and that the carelessness of the owner had merely provided him with an occasion for what he did. One would probably say the same if the drum was struck by lightning. In both cases one would say that although the vapour-filled drum was a necessary condition for the explosion to happen, it was not caused by the owner’s negligence. One might add by way of further explanation that the presence of an arsonist workman or lightning happening to strike at that time and place was a coincidence.

On the other hand, there are cases in which the duty imposed by the rule is to take precautions to prevent loss being caused by third parties or natural events. One example has already been given; the commonsense rule (not legally enforceable, but neglect of which may expose one to blame from one’s wife) which requires one to remove the car radio at night. A legal example is the well known case of *Stansbie v. Troman* (1948) 2 K.B. 48. A decorator working alone in a house went out to buy wallpaper and left the front door unlocked. He was held liable for the loss caused by a thief who entered while he was away. For the purpose of attributing liability to the thief (e.g. in a prosecution for theft) the loss was caused by his deliberate act and no one would have said that it was caused by the door being left open. But for the purpose of attributing liability to the decorator, the loss was caused by his negligence because his duty was to take reasonable care to guard against thieves entering.

These examples show that one cannot give a commonsense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule. Does the rule impose a duty which requires one to guard against, or makes one responsible for, the deliberate acts of third persons? If so, it will be correct to say, when loss is caused by the act of such a third person, that it was caused by the breach of duty. In *Stansbie v. Troman* (1948) 2 K.B. 48, 51-52, Tucker

L.J. referred to a statement of Lord Sumner in *Weld-Blundell v. Stephens* (1920) A.C. 956, 986, in which he had said:

“In general . . . even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B’s mischievous activity, B then becomes a new and independent cause.”

Tucker L.J. went on to comment:

“I do not think that Lord Sumner would have intended that very general statement to apply to the facts of a case such as the present where, as the judge points out, the act of negligence itself consisted in the failure to take reasonable care to guard against the very thing that in fact happened.”

Before answering questions about causation, it is therefore first necessary to identify the scope of the relevant rule. This is not a question of commonsense fact; it is a question of law. In *Stansbie v. Troman* the law imposed a duty which included having to take precautions against burglars. Therefore breach of that duty caused the loss of the property stolen. In the example of the vapour-filled drum, the duty does not extend to taking precautions against arsonists. In other contexts there might be such a duty (compare *The Fiona* (1994) 2 Lloyd’s Rep. 506, 522) but the law of negligence would not impose one.

What, therefore, is the nature of the duty imposed by section 85(1)? Does it include responsibility for acts of third parties or natural events and, if so, for any such acts or only some of them? This is clear that the liability imposed by the subsection is strict; it does not require mens rea in the sense of intention or negligence. Strict liability is imposed in the interest of protecting controlled waters from pollution. The offence is, as Lord Pearson said in *Alphacell Ltd. v. Woodward* (1972) A.C. 824, 842, “in the nature of a public nuisance.: *National Rivers Authority v. Yorkshire Water Services Ltd.* (1995) 1 A.C. 444 is a striking example of a case in which, in the context of a rule which did not apply strict liability, it would have been said that the defendant’s operation of the sewage plant did not cause the pollution but merely provided the occasion for pollution to be caused by the third party who discharged the isooctanol. And in *Alphacell Ltd. v. Woodward* (1972) A.C. 824, 835, Lord Wilberforce said with reference to *Impress (Worcester) Ltd. v. Rees* (1971) 2 All E.R. 357, which I shall discuss later, that:

“it should not be regarded as a decision that in every case the act of a third party necessarily interrupts the chain of causation initiated by the person who owns or operates the installation or plant from which the flow took place.”

Clearly, therefore, the fact that a deliberate act of a third party caused the pollution does not in itself mean that the

defendant's creation of a situation in which the third party could so act did not also cause the pollution for the purposes of section 85(1).

It is not easy to reconcile this proposition with the actual decision of the Divisional Court in itself mean that the defendant's creation of a situation in which the third party could so act did not also cause the pollution for the purposes of section 85(1).

It is not easy to reconcile this proposition with the actual decision of the Divisional Court in *Impress (Worcester) Ltd. v. Rees* (1971) 2 All E.R. 357, to which I have just referred. The appellants kept a fuel oil storage tank with an unlocked valve in their yard near the river. An unauthorised person entered during the night and opened the valve. The justices convicted but the Divisional Court allowed the appeal. Cooke J. said, at p. 528:

“On general principles of causation, the question which the justices ought to have asked themselves was whether that intervening cause was of so powerful a nature that the conduct of the appellants was not a cause at all but merely part of the surrounding circumstances.”

That question, said the Divisional Court, was capable of only one answer, namely that “it was not the conduct of the appellants but the intervening act of the unauthorised person which caused the oil to enter the river.” In *Alphacell Ltd. v. Woodward* (1972) A.C. 824, 835, Lord Wilberforce said, at p. 835, that he did not “desire to question this conclusion” and Lord Salmon said, at p. 847, that it was an example of “the active intervention of a stranger, the risk of which could not reasonably have been foreseen.” The difficulty is, however, that the justices said nothing about whether the risk could reasonably have been foreseen and nor did the Divisional Court. The nearest which the justices came to this question was when they said “the valve was never locked but . . . the appellants ought to have kept it closed at all material times” - a remark which rather suggests that the possibility of tampering should have been foreseen. Whether foreseeability was a relevant matter at all is a point to which I shall return later. But the actual reasoning of the Divisional Court was that the defendant was entitled to be acquitted simply because the escape had been caused by the deliberate act of a stranger. Mr. Philpott urged upon us that the reasoning in *Impress (Worcester) Ltd. vs. Rees* applied squarely to this case and I think that he is right. But in my view the case was wrongly decided. It is inconsistent with Lord Wilberforce's statement that the deliberate act of a third party does not necessarily negative causal connection and with the subsequent decision of this House in *National Rivers Authority v. Yorkshire Water Services Ltd.* (1995) 1 A.C. 444.

While liability under section 85(1) is strict and therefore includes liability for certain deliberate acts of third parties and (by parity of reasoning) natural events, it is not an absolute liability in the sense that all that has to be shown

is that the polluting matter escaped from the defendant's land, irrespective of how this happened. It must still be possible to say that the defendant caused the pollution. Take, for example, the lagoons of effluent in *Price v. Cromack* (1975) 1 W.L.R. 988. They leaked effluent into the river and I have said that in my view the justices were entitled to hold that the pollution had been caused by the defendant maintaining leaky lagoons. But suppose that they emptied into the river because a wall had been breached by a bomb planted by terrorists. I think it would be very difficult to say, as a matter of common sense, that the defendant had caused the pollution. On what principle, therefore, will some acts of third parties (or natural events) negative causal connection for the purposes of section 85(1) and others not?

In *Alphacell Ltd. v. Woodward* (1972) A.C. 824 Lord Salmon, as I have mentioned, suggested that the difference might depend upon whether the act of a third party or natural event was foreseeable or not. This was the approach taken by the justices in *National Rivers Authority v. Wright Engineering Co. Ltd.* (1994) 4 All E.R. 281. That was another case of vandalism leading to oil escaping from a tank into a river. The justices acquitted because they said that although there had been past incidents of vandalism at the defendant's premises, “the vandalism involved was not reasonably foreseeable because it was out of all proportion to the earlier and more minor incidents.” In the Divisional Court, Buckley J., at p. 285, cited with approval a remark of Lloyd L.J. in the Divisional Court in *Welsh Water Authority v. Williams Motors (Cwmdu) Ltd.*, *The Times*, 5 December 1988.

“the question is not what was foreseeable by the respondents or anyone else: the question is whether any act on the part of the respondents caused the pollution.”

Nevertheless, said Buckley J.:

“that does not mean that foreseeability is wholly irrelevant. It is one factor which a tribunal may properly consider in seeking to apply common sense to the question: who or what caused the result under consideration.”

I have already said that I think that to frame the question as “who or what caused the result under consideration” is wrong and distracting, because it may have more than one right answer. The question is whether the defendant caused the pollution. How is foreseeability a relevant factor to consider in answering this question?

In the sense in which the concept of foreseeability is normally used, namely as an ingredient in the tort of negligence, in the form of the question: ought the defendant reasonably to have foreseen what happened, I do not think that it is relevant. Liability under section 85(1) is not based on that someone would put iso-octanol in their sewage. Likewise in *C.P.C. (U.K.) Ltd. v. National Rivers Authority* (1995)

Env. L.R. 131 the defendant operated a factory which used cleaning liquid carried through P.V.C. piping. The piping leaked because it had been badly installed by the reputable subcontractors employed by the previous owners of the factory. The Court of Appeal held that although the defendants were unaware of the existence of the defect and "could not be criticised for failing to discover it," the pollution had nevertheless been caused by their operation of the factory. So the fact that the negligent installation of the pipes had been unforeseeable was no defence. I agree with Lloyd L.J. that the question is not whether the consequences ought to have been foreseen; it is whether the defendant caused the pollution. And foreseeability is not the criterion for deciding whether a person caused something or not. People often cause things which they could not have foreseen.

The true commonsense distinction is, in my view, between acts and events which, although not necessarily foreseeable in the particular case, are in the generality a normal and familiar fact of life, and acts or events which are abnormal and extraordinary. Of course an act or event which is in general terms a normal fact of life may also have been foreseeable in the circumstances of the particular case, but the latter is not necessary for the purposes of liability. There is nothing extraordinary or abnormal about leaky pipes or lagoons as such: these things happen, even if the particular defendant could not reasonably have foreseen that it would happen to him. There is nothing unusual about people putting unlawful substances into the sewage system and the same, regrettably, is true about ordinary vandalism. So when these things happen, one does not say: that was an extraordinary coincidence, which negated the causal connection between the original act of accumulating the polluting substance and its escape. In the context of section 85(1), the defendant's accumulation has still caused the pollution. On the other hand, the example I gave of the terrorist attack would be something so unusual that one would not regard the defendant's conduct as having caused the escape at all.

In the context of natural events, this distinction between normal and extraordinary events emerges in the decision of this House in *Alphacell Ltd. v. Woodward* (1972) A.C. 824. The defendant operated a paper manufacturing plant which involved maintaining tanks of polluting liquid near the river, so that pollution would occur if they overflowed. There were pumps which ought normally to have drawn off the liquid and prevented the tanks from overflowing. But in late November the pumps became choked with brambles, ferns and long leaves: they did not function and an overflow occurred. The House found no difficulty in holding that the pollution was caused by what the defendant had done: Lord Wilberforce said that "the whole complex operation which might lead to this result was an operation deliberately conducted by the appellants . . ." As for "causing," it was true that the pollution would not have happened but for a natural event, namely, the vegetation

getting into the pumps, but, as Lord Pearson said, at p. 845, that was nothing extraordinary.

"There was not even any unusual weather or freak of nature. Autumn is the season of the year in which dead leaves, ferns, pieces of bracken and pieces of bramble may be expected to fall into water and sink below the surface and, if there is a pump, to be sucked up by it."

Lord Salmon said it would have been different if there had been an "act of God," which I take to mean some extraordinary natural event. Likewise in the case of the acts of third parties, I think that once one accepts, as in the light of Lord Wilberforce's comments in the *Alphacell* case and the decision in *National Rivers Authority v. Yorkshire Water Services Ltd.* (1995) 1 A.C. 444 one has to accept, that some deliberate acts of third parties will not negative causal connection, it seems to me that the distinction between ordinary and extraordinary is the only commonsense criterion by which one can distinguish those acts which will negative causal connection from those which will not.

So I think that the defendant in *Impress (Worcester) Ltd. v. Rees* was rightly convicted by the justices and that the defendant in *National Rivers Authority v. Wright Engineering Co. Ltd.* (1994) 4 All E.R. 281 should also have been convicted. The particular form of vandalism may not have been foreseeable (someone had broken the sight gauge) but the precise details will never be foreseeable. In practical terms it was ordinary vandalism.

I shall try to summarise the effect of this discussion.

- (1) Justices dealing with prosecutions for "causing" pollution under section 85(1) should first require the prosecution to identify what it says the defendant did to cause the pollution. If the defendant cannot be said to have done anything at all, the prosecution must fail: the defendant may have "knowingly permitted" pollution but cannot have caused it.
- (2) The prosecution need not prove that the defendant did something which was the immediate cause of the pollution: maintaining tanks, lagoons or sewage systems full of noxious liquid is doing something, even if the immediate cause of the pollution was lack of maintenance, a natural event or the act of a third party.
- (3) When the prosecution has identified something which the defendant did, the justices must decide whether it caused the pollution. They should not be diverted by questions like "What was the cause of the pollution?" or "Did something else cause the pollution?" because to say that something else caused the pollution (like brambles clogging the pumps or vandalism by third parties) is not inconsistent with the defendant having caused it as well.
- (4) If the defendant did something which produced a situation in which the polluting matter could escape

but a necessary condition of the actual escape which happened was also the act of a third party or a natural event, the justices should consider whether that act or event should be regarded as ordinary occurrence, it will not negative the causal effect of the defendant's acts, even if it was not foreseeable that it would happen to that particular defendant or take that particular form. If it can be regarded as something extraordinary, it will be open to the justices to hold that the defendant did not cause the pollution.

- (5) The distinction between ordinary and extraordinary is one of fact and degree to which the justices must apply their common sense and knowledge of what happens in the area.

Applying these principles, it seems to me that there was ample evidence on which the Crown Court was entitled to find that the company had caused the pollution. I would therefore dismiss the appeal.

LORD CLYDE. My Lords, the appellant was convicted on a complaint that on 20 March 1995 he "did cause polluting matter, namely diesel oil, to enter controlled waters, namely the River Ebbw tank on the appellant's premises, flowed onto a yard within the premises, into a storm drain which served to drain the yard, and thereby into the river. It was evident that the oil had left the tank through an outlet which was governed by a tap. The tap had been turned on. It was not proved who had turned it on. It could, and probably was a member of the appellant's staff, but it could have been an intruder. There was not doubt that the oil was polluting matter and no doubt that it had entered the controlled waters. The question for the justices and for the Crown Court on appeal was whether the prosecution of section 85(1) occurs where a person "causes or knowingly permits" a pollutant to enter controlled waters. The context gives some guidance towards the identification of what is meant by "cause." It must involve some kind of active operation by the defendant whereby, with or without the occurrence of other factors, the pollutant enters the controlled waters. If the defendant has simply stood back and not participated to any extent at all, although he might have been guilty of knowingly permitting it, but he will not have caused the pollutant to enter the waters. It is sufficient that his activity has been a cause; it does not require to be the cause. Moreover it is not necessary for the prosecution to prove knowledge, foreseeability, negligence nor intention. These matters may or may not be identified as elements in the history but they are not essentials for the proof of the offence. Furthermore, in determining whether the prosecution has proved that the defendant caused the pollutant to enter the waters account has to be taken of natural forces, acts of God and the actions of third parties, if the evidence justifies taking such considerations into account either as contributing causes or even as excluding any operation of the defendant as a causative factor. The

action of a third party may in some cases be merely one of the concurrent causes. Alternatively it may in other cases be so far out of the ordinary course of things that in the circumstances any active operations of the defendant fade into the background.

There may be a danger in enlarging on any definition of what may constitute a cause that particular expressions may become elevated into standard tests which may distract attention from the formulation may not quite meet the statutory terms. The use of alternative language to that used by the statute may only lead to debate about the precise meaning of such alternative expressions and obscure the true question. The use of the expression "positive act," which appears in the certified question in the present appeal, seems to me to be open to that objection. As the Lord Chancellor, Lord Mackay of Clashfern, observed in *National Rivers Authority v. Yorkshire Water Services Ltd.* (1995) 1 A.C. 444, 452 "the word 'cause' is to be used in its ordinary sense in these provisions and it is not right as matter of law to add further requirements." While I have adopted the language used by Lord Wilberforce in *Alphacell Ltd. v. Woodward* (1972) A.C. 824, of "active operation" I do not consider that it is to be regarded as anything more than a reminder that in the present context absolute passivity is not enough to constitute a cause. The maintaining of a system, the carrying on of an enterprise, and the management of a going concern may each constitute causative factors. So also may the discontinuing of an enterprise or the closing down of a concern, as in *Lockhart v. National Coal Board*, 1981 S.L.T. 161. In many cases an omission may be analysed as the provision or operation of an inadequate or deficient system. Thus a failure to take precautions in relation to a risk of the escape of a pollutant in the course of the management of premises such as those which the appellants were occupying in the present case may be seen as an active operation for the purpose causation.

I would also wish to avoid the language of foreseeability in relation to the inquiry into causation. In deciding whether some particular factor has played so important a part that any activity by the defendant should be seen as entirely superseded as a causative element it is not a consideration of the foreseeability, or reasonable foreseeability, of the extraneous factor which seems to me to be appropriate, but rather its unnatural, extraordinary or unusual character. Matters of fault or negligence are not of immediate relevance in the present context and the concepts particularly related to those matters should best be avoided.

The question in the present case is not whether the appellant caused the oil to leave the tank but the larger question whether the appellant caused the oil to enter controlled waters. In light of the facts it was in my view certainly open to the justices and the Crown Court to conclude that the appellant had caused the oil to enter the controlled waters. I have regard in particular to the provision of an



exposed and unguarded tap in a situation where the premises were not secure against invasion, where on account of the local opposition to the appellant's business the malicious or thoughtless intervention of a third party would not be something out of the ordinary course, and where in the event of any escape of oil out of the tap onto the ground the layout was such as to carry such oil to the yard, to the storm drain and so the river.

The decisions in the various cases to which we were referred, must in my view be seen as depending upon the particular facts of each of them. So far as the present case is concerned, I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: Howell & Co. , Birmingham; The Environment Agency, Cardiff.

J.A.G.

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**THE ENVIRONMENT AGENCY**

**The Environment Agency v Brock Plc (Queen's Bench Division, Roch. L.J., Potts J.,  
February 16, 1998)<sup>1</sup>**

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<sup>1</sup> R. Bradley (Legal Services, Environment Agency, Warrington, Cheshire); S. Clare (Mace and Jones, Huyton, Merseyside).

It was alleged that on December 2 1996, Brock Plc had caused polluting matter, namely tip leachate, to enter a ditch, a tributary of the River Dibbin from the Hooton landfill site at Ellesmere Port contrary to section 85(1) and (6) of the Water Resources Act 1991.

Section 85(1) reads:

“A person contravenes this section if he causes or knowingly permits any poisonous, noxious or polluting matter or any solid waste matter to enter controlled waters.”

On September 23 1997, the magistrates found that Brock Plc, owners of the site in question were visited on December 2 1996 by a Waste Regulation Officer and a Pollution Control Officer. It was found that leachate was leaking from a joint in a pipe into a ditch. Samples of water from the ditch were analyzed and the quality of the reading would deplete the water of oxygen causing the leakage as the seals normally lasted 12 months, and it was barely two months old. The magistrates acquitted the company of the offence and stated the following questions for the opinion of the High Court. The first was not relevant because it was accepted that the tip leachate was polluting matter. The second was whether the ditch constituted controlled waters within the meaning of the Act and the third was, whether as a matter of law the company caused tip leachate to enter the ditch when the same leaked from a hose at the site whilst being pumped by the company from a leachate extraction chimney.

The issue was whether on the facts found by the Magistrates they were able to find that the company had not caused the entry of the leachate into the ditch, because the company had not known of the escape which had been the result of a defect of a latent kind not caused as a result of their negligence.

**Held**, allowing the appeal by way of case stated,

1. The Magistrates were not aware at the time of their decision of the decision of the House of Lords in *Empress Car Company (Abertillery) Ltd v. National Rivers Authority* decided on February 5, 1998. That decision reached the following conclusions.
  - (a) Liability under section 85(1) is not based on negligence; it is strict.
  - (b) Justices dealing with prosecutions for “causing pollution under section 85(1) should first require the prosecution to identify what it says the defendant did to cause the pollution. If the defendant cannot be said to have done anything at all, the prosecution must fail; the defendant may have knowingly permitted pollution but cannot have caused it.
  - (c) The prosecution need not prove that the defendant did something which was the immediate cause of the pollution; maintaining tanks, lagoons or sewage systems full of noxious liquid is doing something, even if the immediate cause of the pollution was lack of maintenance, a natural event or the act of a third party.
  - (d) When the prosecution has identified something which the defendants did, the justices must decide whether it caused the pollution. They should not be diverted by questions like “What was the cause of the pollution” or “Did something else cause the pollution” because to say that something else caused the pollution [like brambles clogging the pumps or vandalism by third parties] was not inconsistent with the defendant having caused it as well.
  - (e) If the defendant did something which produced a situation in which the polluting matter could escape but a necessary condition of the actual escape which happened was also the act of a third party or a natural event, the justices should consider whether that act or even should be regarded as normal fact of life or something extraordinary. If it was in the general run of things a matter of ordinary occurrence, it will not negate the causal effect of the defendant’s acts, even if it was not foreseeable that it would happen to that particular defendant or take that particular form. If it can be regarded as something extraordinary, it will be open to the justices to hold that the defendant did not cause the pollution.
  - (f) The distinction between ordinary and extraordinary was one of fact and degree to which the justices must apply their common sense and knowledge of what happens in the area.
2. The justices had not followed that approach.
3. There were positive acts by the defendants, if there had been no pumping of leachate, no escape could have occurred. The failure of rubber seals or gaskets is an ordinary fact of life. The liability under section 85(1) was absolute in the sense that proof of negligence was not required and the existence of a latent defect in equipment being used by a defendant did not of itself mean that the defendants had not caused the pollution to enter controlled water.
4. The ditch in question clearly came within the definition of “watercourse” and “controlled waters”. A man-made ditch will be a watercourse if it is a ditch through which water flows into another watercourse, lake or river which comes within the definition of “controlled waters” in the act.
5. The matter would be returned to the Magistrates with a direction to convict.

The following judgements were given:

**Roch L.J.:** This is an appeal by way of Case Stated from a decision of the Magistrates for the County of Cheshire, acting in and for the Petty Sessions Division of Ellesmere Port, given on September 2, 1997.

On that day Magistrates heard an information laid against the Respondents, Brock Plc, in these terms. On December 2, 1996 they caused polluting matter, namely tip leachate to enter a ditch a tributary of the River Dibbin from the Hooton landfill site at Hooton Road, Ellesmere Port, contrary to section 85(1) and (6) of the Water Resources Act 1991.

That section can usefully be set out straightaway.

Section 85(1) reads:

“A person contravenes this section if he causes or knowingly permits any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters.”

It is not necessary to read subsection (6) which is concerned with the penalties for committing offences under the section.

The Magistrates found these facts, which are set out in paragraph (2) and (3) of the case which they stated. The are as follows:

- (a) “The Respondents own the Hooton Landfill site at Hooton Road, Ellesmere Port which was visited on 2 December 1996 by Paul Fernee, a Waste Regulation Officer employed by the Environment Agency, and Catherine Shaw, a Pollution Control Officer, employed by the Environment Agency. [They were making a routine site inspection.]
- (b) The inspection as completed at about 10.45 a.m. and Catherine Shaw left the site.
- (c) Paul Fernee then walked to the Eastham Rake landfill site across the Hooton landfill site part Leachate Chimney Number 3 where the chimney was being emptied by way of a hydraulic pump and hose which lead to a lagoon....”

At this point the Magistrates referred to a plan, which is attached to the Case Stated. The Magistrates continued:

“...At this time the pump was in operation.  
(d) At the Lagoon ... no leachate was being pumped out of the end of the hose into the lagoon so Paul Fernee walked along the ditch [i.e. referring to a ditch to the right of the hose and at the right-hand side of the land filled site, running parallel with railway line] and discovered a liquid flowing in the ditch ...”

Again reference is made to the site plan. It shows the point at which the leachate entered the ditch and being not far

from the point where the leachate chimney no. 3 was situated:

- “... which had strong smell of leachate. He then followed the discharge to its start and discovered a leak at the hose coupling point.
- (e) Paul Fernee asked an employee at Brock plc who was working at the other end of the site, to turn off the pump which he did.
- (f) Paul Fernee contacted Catherine Shaw to return to the site and then took photographs 1, 2 and 3.”

Those are attached to the Case Stated. They show the chimney with the pipe coming from it, the bulk of the machinery, the joint in the pipe from which the leachate leaked, and they show two views of the ditch with the course that the leachate took prior to entering the ditch. The Magistrates’ findings go on:

- “(g) Catherine Shaw arrived back at the site at 11.00 a.m. and was joined 15 minutes later by Rachel Argyropoulos... an Assistant Pollution Control Officer employed by the Environment Agency, and samples were taken from the ditch at the point identified on the site plan.
- (h) Catherine Shaw took photographs 4, 5 and 6 [which are attached to the case stated].
- (i) The ditch flows down toward the M53 motorway but goes underground just before the railway track as illustrated on the site plan.”

Again, the site plan attached to the Case Stated shows the ditch flowing parallel with the railway line, and then turning to its right through a right angle and disappearing just before it passes under the M53. The Magistrates’ findings went on:

- (j) The samples were analyzed and the following results were found...”

I do not set out the details of the results.

The Magistrates then set out the levels of various constituents in the water in a natural clean water stream. The went on to find that:

- “(m) The reading which was taken from the sample of water from the ditch would deplete the water of oxygen causing no aquatic life being able to survive in a small water course.

Magistrates then made these findings of fact contained in paragraph (3) of the statement of case:

- “(a) It was contended by the Respondent that the pipe was connected together properly with the rubber seal intact and with no leaks. The whole length of the hose was checked by Robert Greenaway who works for Brock Waste Services Ltd., a subsidiary of Brock plc. At 9.30 a.m. on 2 December 1996 and there were no leaks before he left the site.

(b) The hose was a couple of months old and all the couplings and seals came with the hose.

(c) The rubber seal which had worn was replaced by Robert Greenaway on his return to the site at about 12.00 noon.

(d) Brian Jackson, manager for Brock plc of the landfill sites, arrived on the Hooton landfill site at about 11.45 a.m. and after speaking to officers from the Environment Agency blocked the ditch off three-quarters of the way down its length after seeing a slight leak of liquid 20 metres from the start of the ditch. There was a very little flow of water in the ditch.

(e) Robert Greenaway stated that the ditch was extended by Brock plc 18 to 19 months ago as a safety ditch. The ditch runs to Dibbinsdale Brook known as River Dibbin and the stream runs through Eastham Wood.

(f) It was claimed that the seepage from the hose came from the area where one of the rubber seals had inexplicably failed.”

The Magistrates then record the submissions made to them on behalf of the Respondents, Brock Plc. They were that:

“4. It was contended that the ditch was not part of a water course and that it was not the Respondents fault that the seal failed causing the leakage as the seals normally last 12 months”.

The Magistrates set out the authorities to which they were referred, and that they were also referred to the statutory provisions in the Act defining “controlled waters” and “watercourse”.

The Magistrates were of these opinions:

“(a) Tip leachate is a polluting matter within the meaning of Section 85(1) of the Water Resources Act 1991.

(b) The ditch at the Hooton landfill site, Hooton Road, Ellesmere Port, Cheshire was not controlled water within the meaning of sections 85(1) and 104 of the Water Resources Act as the ditch was man-made rather than naturally occurring.

(c) The defendant did not cause the tip leachate to enter the ditch at the Hooton landfill site, Hooton Road, Ellesmere Port, Cheshire as the leakage from the hose at the said site was not within the control of the defendants, nor caused as a result of their negligence.

Consequently, the Magistrates acquitted the Respondents of the offence charged in the information.

The Magistrates stated these questions for the opinion of this court:

“(a) Whether the tip leachate which entered the ditch.. was polluting matter within the meaning of Section 85(1) of the Water Resources act 1991.”

The question has not been an effective question before this court because it is accepted by Mr. Clare, on behalf of the

Respondents, that on the evidence the tip leachate was polluting matter. The second and third questions stated are:

(b) Whether the ditch at the Hooton landfill site.. constituted controlled waters within the meaning of sections 85(1) and 104 of the .. Act.

(c) Whether as a matter of law the Defendants caused tip leachate to enter the ditch at the Hooton Landfill site .. when the same leaked from a hose at the .. site whilst being pumped by the Defendants from a leachate extraction chimney.”

Of the two effective issues in this appeal, the second (which I shall deal with first) is whether on the facts found by the magistrates they were able to find that the Respondents had not caused the entry of the leachate into the ditch, because the respondents had not known of the escape, which had been the result of a defect of a latent kind not caused as a result of their negligence.

This issue can now, in my judgement, be dealt with quite shortly in the light of the decision of the House of Lords in *Empress Car Company (Abertillery) Ltd v. National Rivers Authority*, decided on February 5 1998. It is to be observed that this is a very recent decision of their Lordships and a decision which was not available to counsel or the Magistrates when this matter was heard in Chester.

The leading speech in that case was that of Lord Hoffmann. During the course of the speech of Lord Hoffmann referred with approval to a decision of the Court of Appeal in *CPC (UK) Limited v. National Rivers Authority* [1994] Env. L.R. 131, a case arising out of an incident of pollution in the river Lyd at Dutton. During the course of the leading judgement in that case Evans L.J. said (page 137):

Before use, Mr. Edis submitted that the summing-up should have directed the jury to consider whether the sub-contractors rather than the defendants had caused the pollution. By directing them to ‘disregard the sub-contractors’ he was in effect, failing to put the main issue raised by the defense to the jury.

We do not accept this submission or the appellants’ criticism of the summing-up. It seems to use that underlying the submission is the false premise that there can only be one cause of an incident such as this. There was no dispute as to what defendants had done. The question for the jury was whether they had caused the escape. That was a question of fact and commonsense for the jury to decide. The fact that the appellants were unaware of the existence of the defect and could not be criticized for failing to discover it, meant that the defect was latent rather than “patent, so far as they were concerned, but this was not relevant in law, because the statute does not require either fault or knowledge to be proved against them. If they did cause the pollution, then it was equally irrelevant that some other person might be held to have ‘caused’ it also. If they had caused it, then that was ‘not a defence in law’.”

Shortly before referring to that authority and approving of the reasoning of the Court of Appeal in that authority, Lord Hoffmann said this, at page 11 of the transcript of the Empress Car Case:

“In the sense in which the concept of foreseeability is normally used, namely as an ingredient in the tort of negligence, in the form of the question: ought the defendant reasonably to have foreseen what happened, I do not think that it is relevant. Liability under section 85(1) is not based on negligence; it is strict.”

Over the page, having referred to the judgement of Evans L.J., Lord Hoffmann went on to say this:

“The true common sense distinction is, in my view, between acts and events which, although not necessarily foreseeable in the particular case, are in the generality a normal and familiar fact of life, and acts or events which are abnormal and extraordinary. Of course an act or event which is in general terms a normal fact of life may also have been foreseeable in the circumstances of the particular case, but the later is not necessary for the purposes of liability. There is nothing extraordinary or abnormal about leaky pipes or lagoons as such; these things happen, even if the particular defendant could not reasonably have foreseen that it would happen to him.”

At the end of his speech, summarizing his analysis of section 85(1) and the authorities point, Lord Hoffmann stated his conclusions in five paragraphs. They appear at page 13 of the transcript.

“(1) Justices dealing with prosecutions for ‘causing’ pollution under section 85(1) should first require the prosecution to identify what it says the defendant did to cause the pollution. If the defendant cannot be said to have done anything at all, the prosecution must fail; the defendant may have ‘knowingly permitted’ pollution but cannot have caused it.

(2) The prosecution need not prove that the defendant did something which was the immediate cause of the pollution; maintaining tanks, lagoons or sewage systems full of noxious liquid is doing something, even if the immediate cause of the pollution was lack of maintenance, a natural event or the act of a third party.

(3) When the prosecution has identified something which the defendant did, the justices must decide whether it caused the pollution. They should not be diverted by questions like ‘What was the cause of the pollution?’ because to say that something else caused the pollution (like brambles clogging the pumps or vandalism by third parties) is not inconsistent with the defendant having caused it as well.

(4) If the defendant did something which produced a situation in which the polluting matter could escape but a necessary condition of the actual escape which happened was also the act of a third party or a natural event, the justices should

consider whether that act or event should be regarded as a normal fact of life or something extraordinary. If it was in the general run of things a matter of ordinary occurrence, it will not negative the causal effect of the defendant’s acts, even if it was not foreseeable that it would happen to that particular defendant or take that particular form. If it can be regarded as something extraordinary, it will be open to the justices to hold that the defendant did not cause the pollution.

(5) The distinction between ordinary and extraordinary is one of fact and degree to which the justices must apply their common sense and knowledge of what happens in the area.”

The Justices did not follow this approach. They can not be blamed for doing so because they did not have the advantage of the guidance which is now available from Lord Hoffmann’s speech. Here the first question should have been:

“Was there a positive act or acts by the respondents?”

In my judgement, there could only be one answer to that question: that there were. First of all, the respondents gathered the tip leachate by the construction of chimneys and then from time to time they pumped leachate from the chimneys into a second lagoon. Indeed, the pollutant could not have reached the ditch in this case, but for the respondents’ act of pumping. Once the pumping stopped, as I understand the situation, so did the entry of pollutant into the ditch. In short, if there had been no pumping of leachate no escape could have occurred.

The Justices should then have gone on, having established those positive acts by the respondents, to consider whether the failure of the rubber seal or gasket was a normal fact of life or something extraordinary. Again, in my judgement, in the circumstances of this case, the question permits of only one answer, namely that the failure so such seals is an ordinary fact of life. When such items are manufactured, then there are times when they are manufactured in a condition which makes them defective. That may not be detectable by the user of the seal. It is no doubt a rare occurrence, but it is an ordinary occurrence in my judgment.

The liability under section 85(1) is absolute in the sense that proof of negligence is not required and the existence of a latent defect in equipment being used by a defendant does not of itself mean that the question, “Did the respondents cause the pollutant to enter controlled waters?” is to be answered: “No”.

The remaining issue is whether the ditch came within the definition of “controlled waters”. I have already read the terms of section 85(1). The purpose of the section is to protect controlled waters from pollution, and it is with that purpose in mind that the second issue has to be considered. “Controlled waters” is a phrase defined by section 104 of

the Act. Section 104(1)© is the relevant part of the section which provides:

“References in this Part to controlled waters are references to waters of any of the following classes –

.....

(d) inland freshwaters, that is to say, the waters of any relevant lake or pond or of so much of any relevant river or watercourse as is above the fresh-water limit.”

“Watercourse” is further defined by subsection (3) of section 104, which provides:

“‘relevant river or watercourse’ means (subject to subsection (4) below) any river or watercourse (including an underground river or watercourse and an artificial river or watercourse) which is neither a public sewer nor a sewer or drain which drains into a public sewer”.

Section 104(2) provides:

“In this Part any reference to the waters of any lake or pond or of any river or watercourse includes a reference to the bottom, channel or bed or any lake, pond, river or, as the case may be, watercourse which is for the time being dry.”

It follows from that provision that the fact that a ditch dries out from time to time does not prevent it being a watercourse. It follows from the provision in subsection (3) that a man-made ditch may in proper circumstances be a watercourse.

The final statutory provision that is required to be cited when considering the meaning of the word “watercourse”, and the question whether this ditch was a watercourse and, therefore, “controlled water” within the meaning of section 85(1) is section 221 of the Act. That provides:

“In this Act, except in so far as the context otherwise requires ‘watercourse’ includes (subject to section 72(2) and 113(1) above) all rivers, streams, ditches, drains, cuts, culverts, dykes, sluices, sewers and passages through which water flows, except mains and other pipes which –

(a) belong to the Authority or a water undertaker; or

(b) are used by a water undertaker or any other person for the purpose only of providing a supply of water to any premises.

In my judgement, a man-made ditch will be a watercourse if it is a ditch through which water flows into another watercourse, lake or river which comes within the definition of “controlled waters” in the Act. Thus a trench dug, for example, as part of a ha-ha which did not connect to any part of a system of controlled water, would not be a watercourse because water would not flow through it. The mere fact that in wet periods water may

stand in the ditch for a time would not, in my judgement, make it a watercourse.

The point in this appeal is whether there was evidence that from time to time water flowed through this ditch into other watercourses or whether the Justices were entitled to make the finding they did, that this was not a watercourse; this was not part of controlled waters within the meaning of section 85(1) because the ditch was man-made rather than naturally occurring.

First, in my judgement the Justices were clearly wrong to approach the question on the basis that whether the ditch was or was not man-made was the determining factor. Section 104(3) makes it clear that a man-made watercourse can come within the definition of “controlled waters”

The Justices findings of fact relevant to this issue were these, that there was a very little flow of water in the ditch, that the ditch had been extended 18 to 19 months before as a safety ditch; and that the ditch ran to Dibbinsdale Brook known as the River Dibbin and the stream ran through Eastham Wood. On those findings, in my judgement, this ditch was clearly a “watercourse” within the meaning of the Act and “controlled waters” within the meaning of section 85(1).

I would answer the two effective questions in this way: (i) the ditch at the Hooton landfill site constituted controlled waters within the meaning of section 85(1) and section 104 of the Act; and (ii) as a matter of law the defendants caused the tip leachate to enter the ditch at the Hooton landfill site. I would return this matter to the Magistrates with a direction that they convict the respondents of the offence with which they were charged.

**Potts J.:** I agree. As to the second question posed by the Justices, namely whether the ditch constituted “controlled waters” within the meaning of sections 85(1) and 104 of the 1991 Act, in my opinion, an artificial watercourse is expressly included within the definition of “controlled waters” by the statutory definition. Accordingly, the Magistrates erred in finding that, as the ditch was man-made rather than naturally occurring, it could not constitute controlled water.

As to the Justices’ third question, I would only say that I respectfully agree with and adopt the analysis of Roch L.J. In my judgement, the Justices approached this issue from the wrong standpoint, as will be clear from the opinion stated at paragraph 7©.

In any event existing authority compelled the Justices in September 1997 to conclude other than they did on this issue. On a proper analysis of *Alphacell Limited v. Woodward* [1972] A.C. 824 and *Attorney-General Reference* (No. 1 of 1994) 1995 1 W.L.R. 559, the facts of this case required the answer “Yes” to the question whether as a matter of law the defendants caused tip leachate to

enter the ditch when such leachate leaked from a hose at the site.

**Comment.** A breakdown of the *actus reus* of section 85(1) of the Water Resources Act 1991 reveals three important factors. First the discharge must consist of “poisonous, noxious or polluting matter or solid waste”. Second this material must have entered “any controlled waters”. Third and most importantly a person to have committed the offence must have caused or knowingly permitted that material to have entered the waters.

In the present case there was no doubt that the material did consist of what can generally be described as “polluting matter”. The arguments were over whether the man-made ditch was “controlled waters” and whether the defendants had caused the matter to enter the ditch. On the question of the definition of “controlled waters” this decision makes clear that a channel can amount to controlled waters even if it is man-made and does not always contain liquid. The importance is that if an enterprise constructs a channel which leads to a river this channel will be controlled waters as much as the river itself even if the channel is only designed to be a safety ditch through which only occasionally water flows. The question of whether the watercourse must always have in it flowing water is determined by section 104(2) as it makes clear that controlled waters can consist of channels which are for the time being dry. This definition does not make clear whether liquid must normally flow through the channel even if it is occasionally dry but this decision suggests that it is sufficient if the channel is used for water to enter into a river even if this only happens from time to time. The issue of the relevance of the ditch being man-made is beyond any doubt as section 104(3) expressly includes “an artificial watercourse”.

The more difficult issue is the question of causation. The House of Lords decision in *Alphacell Limited v. Woodward* established that the omission of “knowingly” means that the person causing the matter to enter is still guilty of the offence even if that person was not negligent. As Potts J. pointed out, even without the benefit of the recent House of Lords decision in *Empress* the Magistrates should have concluded that the company had caused the pollution since there was no intervening cause as in *Empress* where it seems the tap may have been turned on by a third party. The importance of the *Empress* case is that it establishes that foreseeability is irrelevant to whether a person causes pollution. As long as the person being prosecuted did do

something positive which resulted in the pollution that person will be guilty even if other persons also helped cause the discharge. The person prosecuted cannot escape by showing that the chain of events were not foreseeable but only by showing that they were extraordinary. The change is to move the offence from being one of strict liability to being close to one of absolute liability as the events which can truly be described as extraordinary must by the nature of the term be rare.

*In-fill development – conservation area – material considerations – amenity value – loss of private views – public interest dimension - whether Inspector’s decision perverse.*

**A.L. Wood-Robinson v. Secretary of State for the Environment and Wandsworth London Borough Council** (Queen’s Bench Division, Mr. Robin Purchas Q.C. sitting as a Deputy Judge of the High Court, April 3, 1998)<sup>2</sup>.

Planning permission was refused on appeal for the erection of a two-storey house on land in Wimbledon within a conservation area formerly part of the curtilage of a block of flats. The Inspector identified two main issues as being the effect of the proposal on the living environment of nearby residents and the effect the proposal would have on the character and appearance of the surrounding urban locality. As regards the second issue, the Inspector resolved that in favour of the applicant. He concluded, however, that the weight to be given to the compliance with the development plan policies and the enhancement of the conservation area was outweighed by the undesirable effect the development would have on residential amenity. The applicant appealed to the High Court under section 288 of the Town and Country Planning Act 1990 to quash the decision of the Inspector. The primary submission was that on reading the decision letter as a whole it was apparent that the reference to residential amenity was based on the loss of purely private views from neighbouring dwellings. It was submitted that planning is concerned with land use from the point of view of the public interest and is generally not concerned with private rights as such, and further that there is authority to support the proposition that there is no private right to a view as such. The loss of a private right would have to be characterized by something that justified its protection in the public interest before it became material to planning control.

**Held**, dismissing the application,

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<sup>2</sup> Miss M. Ellis (Sharpe Pritchard, London); Mr. Litton (The Treasury Solicitor).



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**V**

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***Rights of Local  
Communities to Resource  
Utilization***

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**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL CASE NO. 238 OF 1999 (OS)**

FRANCIS KEMAI  
DAVID SITIENEI  
KIPSANG KILEL  
WILSON MARTIM  
WILLAIM KIRINYET  
JOEL BUSIENI  
JOSEPH BARNO  
SAMUEL SITIENEI  
DAVID KORIR  
JOSEPH KIPLANGAT ROTICH

1ST APPLICANT  
2ND APPLICANT  
3RD APPLICANT  
4TH APPLICANT  
5TH APPLICANT  
6TH APPLICANT  
7TH APPLICANT  
8TH APPLICANT  
9TH APPLICANT  
10TH APPLICANT

-VERSUS-

THE ATTORNEY GENERAL  
THE PROVINCIAL COMMISSIONER  
RIFT VALLEY PROVINCE  
RIFT VALLEY PROVINCIAL FOREST OFFICER  
DISTRICT COMMISSIONER FOR NAKURU

1ST RESPONDENT  
2ND RESPONDENT  
3RD RESPONDENT  
4TH RESPONDENT

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## JUDGEMENT

In this suit instituted by way of an originating summons (which the plaintiffs called an “originating motion” which all the parties had no doubt was meant to refer to the “originating summons”), the 5,000 members of the Ogiek ethnic community, ten of whom are expressly impleaded as plaintiffs representing themselves and the rest of the others who consented to be so represented in this suit, have moved this court (after leave of the court for that purpose) to make two declarations and two orders, that is to say:

- (a) a declaration that their eviction from Tinet Forest by the Government (acting by the provincial administration) contravenes their rights to the protection of the law, not to be discriminated against, and to reside in any part of Kenya;
- (b) a declaration that their right to life has been contravened by the forcible victim from the Tinet Forest;
- (c) an order that the Government herein represented by the Attorney-general, compensates the plaintiffs; and
- (d) an order that the defendants pay the costs of this suit.

The plaintiffs seek these declarations and orders on the basis of their pleaded averments that they have been living in Tinet Forest since time immemorial (counting the time their community began living in the area), and yet after virtually daily harassments by the defendants, the plaintiffs are now ordered to vacate the forest which has been the home of their ancestors before the birth of this Nation, and which is still the home of the plaintiffs as the descendants and members of that community, even after their ancestral land was declared a forest as far back as the early colonial rule and has since remained a declared forest area to this day. They complain that the eviction is coming after the Government had finally accepted to have their community settled in Tinet Forest and a number of other places like Marioshoni, Teret and Ndoinet, among others. They say this Government acceptance was in 1991; and between 1991 and 1998 the community settled in the area in question, with the full co-operation of the Government which issued letters of allotment of specific pieces of land to the individual members of the community each of whom was shown the precise plots on the ground, whereupon the community has embarked on massive developmental activities, building many primary schools and trading centres, carrying out modern crop farming and animal husbandry and other economic management, and the construction of permanent and semi-permanent houses.

So, the plaintiffs say that when in MAY LAS YEAR (1999) the Government through the District Commissioner, issued a fourteen days’ ultimatum, followed a few days later with a reiteration of the threat to the community to vacate or risk a forceful eviction from the forest and their ancestral land, they considered the ultimatum and threat a violation of their aforesaid rights and that it was so real and eminent

that the eviction must be stopped, to avoid irremediable harm befalling the plaintiffs and their children and the community generally. They say that tension in Tinet Forest, following the threat is so high that unless the Government stops making good its threat there may be a breakdown in law and order in what the plaintiffs call “a clash”. They say that their constitutional rights guaranteed under sections 71, and 82 of the Constitution of Kenya, are at stake. They say that is the reason they are before us, seeking the declarations to which we have already adumbrated: that is to say, that Tinet Forest, admittedly one of the country’s gazetted forests is their ancestral home where they derive their livelihood where they gather food and hunt and farm, and they are not going to go away; they do not know any other home except this forest; they would be landless if evicted.

It was said on their behalf, that the applicants depend, for their livelihood, on this forest, they being food gatherers, hunters, peasant farmers, bee-keepers, and their culture is associated with this forest where they have their residential houses. It was said that their culture is basically one concerned with the preservation of nature so as to sustain their livelihood. Because of their attachment to the forest, it is said, the members of this community have been a source of the preservation of the natural environment; they have never been a threat to the natural environment, and they can never interfere with it, except in so far as it is necessary to build schools, provincial Government administrative centres, trading centres, and houses of worship (to wit, the Roman Catholic Church buildings).

The four respondents, on behalf of the Government, answered the applicants by stating that the applicants have not disclosed the truth of the matter concerning this case; and, according to the respondents, the truth of the matter is that these applicants and the 5000 persons they represent, are not the genuine members of the Ogiek community, and they have not been living in Tinet Forest since time immemorial; for, the genuine members of the Ogiek community were settled by the Government at Sururu, Likia and Teret. The respondents said that in the period between 1991 and 1998 the Government, intending to degazette a part of Tinet Forest to settle there landless Kenyans, proceeded and issued some allocation of land documents certifying that the individuals named in each card and identified therein, had been allocated the plot of land whose number was stated in the respective cards, copies of which were exhibited before us in court. According to the respondents those documents were not letters of land allotment but a mere promise by the Government to allocate those people with land if it became available; but, nevertheless, the applicants were not amongst the people who were issued with those cards anyway.

The respondents say that the Government later realized that the part of Tinet Forest which was intended to be degazetted for settling “the applicants” was a water

catchment areas, and the Government shelved the settlement plan; and when the Government discovered that the applicants had entered Tinet Forest unlawfully, it, through the chief conservator of forests, gave the applicants a notice to vacate the forest with immediate effect. The district commissioner for Nakuru District under which the Tinet Forest falls says that he gave notice to the applicants to vacate the area because the applicants had entered and settled the unlawfully. He has never harassed the applicants, but instead he has advised them to vacate the Government gazetted forest peacefully. The legal advice the district commissioner has received and verily believes to be correct is that “those rights and freedoms enshrined in the Constitution are subject to limitations designed to ensure that their enjoyment by any individual does not prejudice the rights and freedoms of others or the public interest.”

Concerning the position taken by the applicants that they are completely landless, the respondents say that that is not the true position, and that archival administrative records availed from our National Archives show the contrary and that the colonial Government resettled the applicants elsewhere, along with other WaDorobo people. But after the said resettlement elsewhere, some people entered the Forest of Tinet, with an intention to dwell there without any licence given by the forests authority on behalf of the Government. The unauthorized occupation of the forest has been followed by numerous evictions since the date of the gazette of the forest as such. The Government’s 1991-1998 plan to settle all landless (including some Ogiek people) was purely on humanitarian considerations, but the programme did not materialise when it was later found that to go ahead with it would necessarily result in environmental degradation which would adversely affect the role of the forest as a natural forest reserve and a water catchment area, with dire consequences for rivers springing from there which, presumably sustain human life, the fauna and the flora there are downstream and their environs. So the plan was shelved, at least for the time being.

Concerning the claim of the applicants that the eviction was selectively discriminatory against them alone, the respondents answered by denying any discrimination and stated that all persons who have invaded the forest are the subject of the eviction. Regarding the applicants’ averments that the eviction would deprive them of their right to livelihood, the respondents say that this allegation is not true, because the applicants have not been dependent on forest produce alone, because, they also keep livestock. The applicants’ statements that there are massive developments in the area are denied by the respondents who add that things like building schools and churches could not be done without the express authorisation of the commissioner of lands as the custodian of Government Land (This aspect suggests that there was no such express or any authorisation). The respondents say that the forest in question is still intact, and no sub-division and allocation

of any piece of land there to anyone has been approved or effected.

The local Catholic Diocese of Nakuru came into this litigation on the side of the applicants, expressing its interest in the matter for three reasons, namely, first, that the Diocese has built churches and schools in the disputed area and is, therefore, a stakeholder on any issue touching on that land; secondly, that in the event of an eviction of the applicants taking place as it is threatened, such action is likely to impinge on the operations of the Church in the area, because the persons adversely affected by the eviction are likely to seek assistance (both material and spiritual) from the Church, and the Church is likely to incur tremendous amounts of monetary expenditure trying to look for alternative accommodation for displaced persons; and thirdly, that the Diocese has been assisting the peasant farmers in the disputed area in matters of agriculture by supplying seed and fertilizers, to ensure that the farmers are self-supporting. These are the reasons why the local Diocese is interested in the outcome of this case, and that is why it has stood by the applicants in these proceedings. No affidavit was filed on behalf of the Diocese, but it adopted everything filed by and for the applicants on the basis of which the Diocese supported the application and joined the applicants in seeking the declarations and orders which we specified at the beginning of our judgement herein. The Diocese adopted the factual exposition laid out for the applicants.

From the historical records furnished to the court in these proceedings it is plain that by the time of the second phase of the colonial evolution and organisation of racial segregation by the creation of African ethnic land reserves through legal regimes enacted in the early 1930’s particularly following the Land Commission (commonly referred to as the Carter Commission), Cmd 4556, 1934, which had actually started its work as early as 1930, there were found in an area including Tinet Forest, peoples whose changing nomenclature and profusion of alternate names are one of the sources of confusion, just as the simplistic and indiscriminate groupings and the misleading lumping together of those diverse peoples is not helpful in distinguishing and identifying which persons are being referred to. But in these proceedings it was agreed that the people found in the area in question in the 1930’s were Ndorobo, or Dorobo, or Wandorobo, being variant terms of the Maasai term *II Torobo*, meaning poor folk, on account of having no cattle and reduced to eating the meat of wild animals (eaters of the meat of wild animals), and were, in their primary economic pursuit, hunters and gatherers hunting game and collecting honey. They commonly inhabited highland forests in the past; but with the intrusion of the white settlers they were dispersed to the plains, although they preferred their accustomed elevations, with forest as their natural environment where they found safety, familiarity and food. They left their refuge of foliage with the greatest reluctance, thanks to their honey complex.

Amongst the Dorobo is a group called Okiek, or Ogiek, living in close proximity to Kalenjin-speaking peoples, such as the Nandi and the Kipsigis, and they speak a Kalenjin-related dialect, and bear many overt cultural characteristics of their said neighbours. Traditionally they were highland hunter-gatherers inhabiting the southerly highland areas and the fringes of the lower forests. But as Andrew Fedders and Cynthia Salvadori in their useful study, *Peoples, and Cultures of Kenya*, (1979), at p14, tell us, to-day's Ogiek "is not the sum of an age-old pre-food-producing past", and to uninitiated eyes they disguise their elemental hunter-gatherer cultural characteristics; and, indeed, as those learned authors write about these people (at p 15), these people to-day attempt to herd or cultivate so that hunting has become a secondary economic pursuit for them; and although the social value of honey is incalculable, it "has never constituted more than one-fifth of their diet", and is only a pre-eminent element in ritual and social communication through exchange. It is said that their attachment to place is proverbial, yet they have always been mobile and nomadic within the general bounds of their hunting and gathering grounds. Their rights "specifically involve the collection of honey and extend to hunting and gathering" wild vegetables, roots and berries.

One matter sharply illustrates the clear change from the traditional cultural way of life to a very different modern lifestyle of a present-day Ogiek. Studies show an Ogiek of yesterday as one characterised by a simplicity of material culture. Home is a dome-shaped hut constructed from a frame of sticks, twigs and branches and thatched with leaves or grass; a semi-permanent shelter, easily abandoned, and no burden when people move. These traditional shelters contrast sharply with the modern houses of corrugated iron-sheet roofs and glass windows, whose photographs this court was shown by the applicants. The schools and churches the applicants have built; the market centres developed, and agricultural activities engaged in, are all evidence of a fundamentally changed people. It boils down to one thing. It belies the notion that these people sustain their livelihood by hunting and gathering as the main or only way out to-day.

They cannot be said to be engaging in cultural and economic activities which depend on ensuring the continuous presence of forests. While the Ogiek of yester-years shaped his life on the basis of thick forests or at least landscapes with adequate trees and other vegetation, one of today may have to clear at least a part of the forest to make room for a market centre. While yesterday's Ogiek lived in loosely organised societies lacking centralised authority, resulting in a social fluidity which enabled him to respond to the slightest changes in his environment with an essential sensitivity and speed on which his very life may depend, an Ogiek of to-day, we are told by the applicants in their sworn affidavit, lives under a chief who was until recently, his own son. While Ogieks of perhaps the yonder past were bound by honey, those of today, as

we have seen from the applicants' affidavits, are bound by the spirit of the Church.

So, whilst in his undiluted traditional culture the Ogiek knew their environment best and exploited it in the most conservational manner, they have embraced modernity which does not necessarily conserve their environment. As we have just said, they cannot build a school or a church house, or develop a market centre, without cutting down a tree or clear a shrub and natural flowers on which bees depend, and on which bee-hives can be lodged, from which honey can be collected, and from which fruits and berries can be gathered. The bush in which wild game can be hunted is inconsistent with the farming (even though the applicants call it peasant farming) they tell us they are now engaged in. Their own relatively permanent homesteads cannot also be home or wild game which the applicants want us to believe to be one of their mainstay. As the applicants dig pit-latrines or construct other sewage systems for schools, market places, residences, etc, as of necessity they must have, they obviously provide sources of actual or potential terrestrial pollutants.

Plainly, therefore, for the applicants to tell the court as they did, that they lead a life which is environmentally conservational, is to be speaking of a people of a by-gone era, and not of the present. Professor William Robert Ochieng' in his study of the histories, development and transformation of certain societies of the Rift Valley, groups the Ogiek people amongst communities whose character as predominately hunter-gathers who practised very minimal agriculture subsisted only up "until the middle of the eighteenth century", and that is when they "did not have cattle" and lived by hunting; but from "the middle of the seventh century" their economy had begun to change: William Robert Ochieng, *An Outline History of the Rift Valley of Kenya Upto AD 1900*, (1975, reprinted 1982), at p 10.

It is on record and agreed in these proceedings, that the colonial authorities declared the disputed area to be a forest areas and moved people out of it and translocated them in certain designated areas; and the area has remained gazetted as a forest area to this day, under the Forests Act (Cap 385). One of the effects of declaring the area to be a forest area was that it was also declared to be a nature reserve for the purpose of preserving the natural amenities thereof and the flora and fauna therein. In such a nature reserve, no cutting, grazing, removal of forest produce or disturbance of the flora shall be allowed, except with the permission of the director of forestry, and permission shall only be given with the object of conservation of the natural flora and amenities of the reserve. Hunting, fishing and the disturbance of the fauna shall be prohibited except in so far as may be permitted by the director of forestry in consultation with the chief game warden, and permission shall only be given in cases where the director of forestry in consultation with the chief game warden considers it necessary or desirable to take or kill any species. The

director of forestry or any person authorized by him in that behalf may issue licences for all or any of the enumerated purposes, upon such conditions as may be approved by the director of forestry or upon such conditions and subject of payment of such fees or royalties and may be prescribed; but no licence shall be issued for any purpose in respect of which a licence is required under the Wildlife (Conservation and Management) Act (cap 376) or under the Fisheries Act (cap 378).

The activities in the forest, which require the aforesaid licence, and are otherwise prohibited unless an actor has a licence to do so, include felling, cutting, burning, injuring or removing any forest produce, which includes back, beeswax, canes, charcoal, creepers, earth, fibres, firewood, fruit, galls, grass, gum, honey, leaves, limestone, litter, moss, murrum, peat, plants, reeds, resin, rushes, rubber, sap seeds, spices, stone, timber, trees, wax, withers and such other things as the minister may, by notice in the Gazette declare to be forest produce. Another prohibition, unless done with a licence, is to be or remain in a forest area between the hours of 9 p.m. and 6 a.m. unless one is using a recognized road or footpath or is in occupation of a building authorised by the director of forestry.

Others of the various prohibitions which are relevant to the present case, are that as a rule, no person shall, except under the licence of the director of forestry, in a forest area, erect any building or cattle enclosure; or depasture cattle, or allow any cattle to be therein; or clear, cultivate or break up land for cultivation or for any other purpose; or capture or kill any animal, set or be in possession of any trap, snare, gin or net, or dig any pit, for the purpose of catching any animal, or use or be in possession of any poison or poisoned weapon; but capturing or killing an animal in accordance with the conditions of a valid licence or permit issued under the Wildlife (Conservation and Management) Act is allowed. No one is allowed to collect any honey or beeswax, or to hang on any tree or elsewhere any honey barrel or other receptacle for the purpose of collecting any honey or beeswax, or to enter for the purpose of collecting these things or any of them, or to be in the forest with any equipment designed for the purpose of collecting honey or beeswax.

Sections 9 to 13 of the Forests Act set out certain statutory measures to be taken to enforce the prohibitory provisions of the Act. Nothing in the Act suggests that those measures are comprehensive and exhaustively exclusive. Certain penalties of a criminal nature following a successful criminal prosecution under the Act are also prescribed. Again nothing in the Act suggests that those are the only penal or remedial sanctions under the law to be exacted. In the Act there are also provisions for the forests authorities to have recourse to extra-curial self-help actions to deal with the law transgressors. As we had the misfortune of the learned advocates for all the parties not addressing us satisfactorily on this important legislation and it import, we had no advantage of benefiting from their

expressed respective positions on the Act, and we only raise it because it is in our minds as we consider the presence of the applicants and other persons in the forest area in question. It is one of the laws relevant to the subject; nobody has challenged its prohibitions and its permit and licensing requirement; and he who has not shown that he has complied with that law or any other law applicable, for him to be in the forest area and to exploit and enjoy its natural endowments should surely not be heard to seek the help of the law to protect him from positive action taken to help him desist from acting in disregard of the law of the land.

It was conceded by Mr. Mirugi Kariuki for the interested party, and by extension, by Mr. Serگون for the applicants, that the applicants and/or their forefathers were repeatedly evicted from this area but they kept on returning to this forest area. They were removed to an area known as Chepalungu, and after each eviction there had been a tendency for individuals to seep back into the Tinet and adjoining forest area, where lack of supervision caused a further build-up of settlement until measures once again had to be taken to sort them out. Records state (at document 30AAA in the bundle of exhibits in court) that since 1941 until roughly early in 1952 the Tinet Forest area had been largely uninhabited. Later the forest department encouraged the settlement of a limited number of families to look after the interest of the department on a part-time basis. This resulted in a build-up of settlement, and the matter led to strained relations between various colonial government departments. By 1956 only a mere seven persons appear to be in Tinet, but as forest guards.

Mr. Mirugi Kariuki said that what the repeated evictions and repeated seeping back show us is a continuing struggle of a people: a resistance of the people all along: evicted people always coming back, and being pushed out again, and people returning. From all these things the court finds that if the applicants' children, or if they themselves or some of them, are living in Tinet Forest, they are forcefully there: they are in that forest and doing what they say they are doing in that forest, as apart of their continuing struggle and resistance. they are not there after compliance with the requirements of the Forests Act. They have not bothered to seek any licence to be there. Theirs is simply to seep back into the forest after every eviction, and after trickling back they build-up in numbers and increase their socio-economic activities to a point they are noticed and evicted again.

These people do not think much of a law which will stand between them and the Tinet Forest. In particular, of the Forests Act they say through Mr. Mirugi Kariuki, that it found them there in 1942 when it was enacted, and it never adversely affected them. But the recorded evictions they acknowledge and their admitted repeated coming back, followed by other evictions contradict them on this. That is why even in their affidavit in support they complain of a continuous harassment by the provincial administration.

The centre piece of the arguments in support of the applicants' case was that to evict the applicants from this particular forest would be unconstitutional because (a) it would defeat a people's rights to their indigenous home, and deprive them of their right to life or livelihood (as they preferred to put it); and (b) it is discriminatory, insofar as other ethnic groups who are not Ogiek are not being evicted from this very place.

We were referred to the Indian case of *Tellis and others v Bombay Municipal Corporation Corporation and others* (1987) LRC (Const) 351, on the first point concerning the right to life as one of the constitutional fundamental rights. It was a case of the forcible eviction of pavement and slum dwellers in the city of Bombay, India. When we read that case, we found its main thrust on this point to be that although the right to life was a wide and far-reaching right, and the evidence suggested that eviction of the petitioners had deprived them of their livelihood, the Constitution did not impose an absolute embargo on deprivation of life or personal liberty. What was protected was protection against deprivation not according to procedure established by law, which must be fair, just and reasonable; e.g. affording an intended evicted an opportunity to show why he should not be moved. In fact in that case the Supreme Court of India consisting of the very eminent Chief Justice Chandrachud, and the Hon. Justices Ali, Tulzapurkar, Reddy and Varadarajan, found and decided and concluded that the Bombay Municipal corporation were justified in removing the petitioners, even though these pavement and slum dwellers were probably the poorest of the poor on the Planet Earth.

*Tellis* case is not, therefore, helpful to the present applicants. The applicants are not the poorest of earthlings; and even if they were, records show that they by themselves or by their ancestors were given alternative land during the colonial days, and such alternative land for Tinet Forest was compensation. All along they have had a fair opportunity to come to the court to challenge the many evictions that have gone on before, but they have never done so till this late. If they showed to the Government reasons why they should not be evicted on any previous occasions and the Government did not reverse evictions, it was incumbent upon the applicants or their forefathers to seek redress of the law. Instead, however, they have opted for either surreptitious or forceful occupation of the forest.

These applicants cannot say that Tinet Forest is their land and, therefore, their means of livelihood. By attempting to show that the Government has allowed them to remain in the area, and by trying to found their right to remain on the land by virtue of letters of land allotment and allocation of parcels of the land as they tried to show in the attached copies of those certificates of land allocation, the applicants thereby recognized the Government as the owner of the land in question, and the right, authority and the legal power of the Government to allocate a part of its land to the

applicants. If the applicants maintain that the land was theirs by right, then how could they accept allocation to them of what was theirs by one who had no right and capacity to give and allocate what it did not have or own? Once they sought to peg, however lightly, their claim of right on these Government certificates of allocation of land to themselves, the plaintiffs forfeited a right to deny that the land belonged to the allocating authority, and they cannot be heard to assert that the land is theirs from time immemorial when they are at the same time accepting it from he whose titled they deny. So, we find that these particular plaintiffs are not being deprived of their means to livelihood; they are merely being told to go to where they had previously been removed; they have alternative land to go to, namely, at Sururu, Likia, Teret, etc, but they are resisting efforts to have them go there. They have not said that the alternative land given them is a dead moon incapable of sustaining human life.

To say that to be evicted from the forest is to be deprived of the means to livelihood because then there will be no place from which to collect honey or where to cultivate and get wild game, etc, is to miss the point. You do not have to own a forest to hunt in it. You do not have to own a forest to harvest honey from it. You do not have to own a forest to gather fruits from it. This is like to say, that to climb Mount Kenya you must own it; to fish in our territorial water of the Indian Ocean you must dwell on, and own the Indian Ocean; to drink water from the weeping stone of Kakamega you must own that stone; to have access to the scenic caves of Mount Elgon you must own that mountain. But as we all know, those who fish in Lake Victoria do not own and reside on the Lake; they come from afar and near; just as those who may wish to exploit the natural resources of the Tinet Forest do not have to reside in the Forest, and they may come from far away districts or from nearby. We know that those who exploit the proverbial Meru Oak from Mount Kenya Forests do not necessarily dwell on that mountain in those forests. Those who enjoy the honey of Tharaka do not necessarily own the shrubs and wild flowers and wild bees which manufacture it; nor do we enjoy that honey own the lands where it is sourced. There is no reason why the Ogiek, should be the only favoured community to own and exploit at source the sources of our natural resources, a privilege not enjoyed or extended to other Kenyans.

No; they are not being deprived of their means of livelihood and a right to life. Like every other Kenyan, they are being told not to dwell on a means of livelihood preserved and protected for all others in the Republic; but they can, like other Kenyans, still eke out a livelihood out of the same forest area by observing permit and licensing laws like everyone else does or may do. The applicants can obtain permits and licences to enter the forest and engage in some permissible and permitted life-supporting economic activity there. The quit-the-forest notice to the applicants does not bar them from continuing to enjoy the same privileges permitted by law, on obtaining the statutory

prescribed authorization from the relevant authorities. They can get those permits when they are outside the forest area; just the same way other Kenyans who do not live anywhere near this same forest are gaining access to the forest and exploiting its resources, as we have been told by the applicants. They do not dwell there, and yet they come there under permit. Plainly, the means of livelihood is not denied to the applicants. The forest and its resources are open to the applicants as much as they are to other Kenyans, but under controlled and regulated access and exploitation necessary for the good of all Kenya.

If hunting and gathering in a territory were in themselves alone to give automatic legal proprietary rights to the grounds and socials we hunt and gather upon then those who graze cattle nomadically in migratory shifts everywhere according to climatic changes, would have claimed ownership of every inch of every soil on which they have grazed their cattle. If every fisherman who fished in the Sagana River or River Tana or in Lake Victoria were to say his is the Sagana River, his is the mighty Tana, his is Lake Victoria, then these and other rivers would not belong to Kenya but to private persons; and Lake Victoria would not be ours, but would have been grabbed long time ago by every fisherman. But these gifts Mother Nature to us have not suffered that fate, because they are common property for the good of everyone; just as public forests are common property for the common weal of mankind. They cannot be a free subject of uncontrolled and unregulated privatisation either for the benefit of individuals or a group of individuals howsoever classified and called.

It is our considered opinion, that as the applicants in common with all other Kenyans may still have access to the forest under licences and permits the eviction order complained of has not encroached on the fundamental rights of the applicants as protected by the Constitution of Kenya, and their right to life is intact; their livelihood can still be earned from the forest as by law prescribed.

We were referred to the Australian case of *Eddie Mabo and Others v The State of Queensland* (1992) 66 QLR 408. We carefully read that case. Its decision seems to have overthrown the land law of that country of about 200 years. This High Court of Australia greatly benefited from the very careful and closely reasoned arguments and a perfect analysis by the advocates who argued the case. The entire corpus of the common law and land statutes and customary law rights of the indigenous peoples of Australia, were dissected to their core by arguments most discerning; and the well-prepared and well-presented lawyers' discourses on the whole law were placed before the court. Here we have missed the opportunity to closely analyse the whole of our land law, because the various land statutes and customary law were not argued, and the case was presented within the narrow limits of the forests legislation and the case was presented within the narrow limits of the forests

legislation and the extra-curial struggles and resistance of the people who had been removed from the place and relocated elsewhere.

Although we were denied the opportunity by a lack of full or any serious argument on, and analysis of, the various relevant land statutes, customary law rights, and the common law, we read the Mabo case, but found that the material facts in it and which led to the propositions of principle there cannot be fairly likened to those obtaining in the instant case. There the facts justified the analysis by the court of the theory of universal and absolute crown ownership, the acquisition of sovereignty, reception of the commons law, crown title to colonies and crown ownership of colonial land, the patrimony of the nation, the royal prerogative, the need for recognition by the crown of native title, the nature and incidents of native title, the extinguishment of native title, the effect of post-acquisition transactions, and deed of grant in trust. The applicants there had a culture and rights sharply different from those of the applicants in the instant case. Theirs was a life of settled people in houses in villages in one fixed place, with land cultivation and crop agriculture as their way of life. They lived in houses organised in named villages, and one would be moving from one village to another. Land was culturally parceled out to individuals, and "boundaries are in terms of known land marks". Gardening was of the most profound importance to the inhabitants at and prior to early European contact. Gardening was important not only from the point of view of subsistence but to provide produce for consumption or exchange. Prestige depended on gardening prowess.

In that kind of setting, those people's rights were to the land itself. Our people of Tinet Forest were concerned more with hunting and gathering with no territorial fixity. They traditionally shifted from place to place in search of hunting and gathering facilities. For such people climatic changes controlled their temporary residence. Whether a people without a fixity of residence could have proprietary rights to any given piece of land, or whether they only had rights of access to hunting and gathering grounds - whether right of access to havens of birds, game, fruits and honey gives title to the lands where wild game, berries and bees are found - were not the focus of the arguments in this case; and the material legal issues arising from the various land law regimes were not canvassed before us as they were in the Mabo case. In the Mabo case the residents at no time ever conceded that of the Government over the land which they were asking the Government to allocate to them. Government could to allocate to them what was theirs already if it did not have ownership powers.

These considerations make it superfluous for us to deal specifically with the other cases cited on this point, although we have anxiously studied them, and we have found them not advancing the applicants' case on the present facts before us.



With regard to the complaint that there is discriminatory action by the Government against the plaintiffs, the applicants said that while the respondents say that they are taking the action complained of because it is a gazetted forest area which they seek to protect by evicting the plaintiffs from it, there are other persons who are allowed to live in the same forest. It is said that it is the plaintiffs alone who are being addressed. This assertion if true, and it has been denied, would obviously give the plaintiff a cause for feeling discriminated against unless other lawful and proper considerations entered the picture. The trouble here is that this was a matter of evidence, and evidence was required to prove at least seven things:

- (1) who these other people were;
- (2) when these other people were;
- (3) under what colour of right (if any) they claimed to enter;
- (4) whether they are there in violation of the provisions of the statute concerned;
- (5) the precise wording of the order of eviction; and
- (6) the exact scope of the order of eviction, particularly with regard to the persons to be adversely affected by its implementation;
- (7) the actual cited ground for removing the applicants, i.e. whether they are being removed solely or predominately on grounds of their ethnicity.

Evidence on these things must be provided by the person alleging discriminatory action against him. For instance, in the case of *Akar v Attorney-General of Sierra Leone*, (1969) 3 All ER 384, which was cited to us, a legislation was alleged to be discriminatory against a person not of negro African descent born in Sierra Leone acquiring citizenship at the time of independence. The legislation in question retrospectively limited citizenship to persons of negro African descent. It was struck down as enacting discrimination on the ground of race. To arrive at that decision the Judicial Committee of the Privy Council had to analyse the precise wording of the legislation in order to find what was discriminatory in it, taken in its proper context.

In a case here at home, *Shah Vershi Devshi & Co. Ltd. v The Transport Licensing Board*, (1971) EA 289, decided by this High Court composed of Chanan Singh, J, and Simpson, J (afterwards Chief Justice of Kenya), refusal of a licence (under a transport licensing legislation) to citizens of Kenya, by reason of their being of Asian origin, led to the court holding the treatment discriminatory. To reach that conclusion the court was furnished with a letter and the court paid particular attention to it, in which was written by the chairman of the licensing board, that the licences should be refused “on the ground that the majority shares” were “owned by non-citizens”, and that Africans should be favoured. As it turned out “non-citizens” was only a euphemism covering citizens who were not of black African stock. Anyway, the point is that the acts and actual words complained of were before the court.

The same was what happened in the case of *Madhwa and others v The City Council of Nairobi*, (1968) EA 406, where a resolution of the Social Services and Housing Committee was in the enumerated terms titled “Africanization of Commerce: Municipal Market”, then followed what had been resolved, and was complained of as being discriminatory of non-citizens being evicted from the market stalls by the City Council of Nairobi. Again the court had before it what was expressed.

In our case, the actual acts and words complained of were not placed before us. What we have before us are copies of newspaper cuttings. They bear headlines “Government to evict the Ogiek”, and “Ogiek notice stays, says DC”. The plaintiffs have told us that there are in the forest people from other communities. The newspapers did not mention anything about such people, and whether the quit notice covered them. The accuracy of those headlines was not guaranteed. The Ogiek people might have been the dominant community to capture the newspaper headlines, but that did not necessarily exclude from the quit order other persons. So, there is no offense when we answer in short that there is nothing of anyone which is being compulsorily acquired by the Government in this case. It is the user of the forest which is being controlled here.

When Mrs. Madahana and Mr. Njoroge, for the respondents said that the Government is taking these steps to protect the forest area as a water catchment area, they were summarily dismissed by Mr. Mirugi who wondered as to when Government came to know that it was a water catchment area; and said that the fact that the land is a forest area gazetted as such, does not mean that human beings should be prevented from living in that forest.

With due respect, the court expected a more extended and in-depth presentation on this very deep-seated problem of our environment raised by the reference to the need to preserve and protect rain water catchment areas. We cannot be oblivious to that problem as we discuss land rights and use, natural resources and their exploitation, human settlement and landlessness. But the casual way in which the issue of the preservation and protection of rain water catchment areas, was handed by counsel in these proceedings only goes to illustrate the negative results of the purely economics-driven approaches to human and social problems, without caring for the limitations of the biosphere with a view to undertaking human, and socio-economic development within the limits of Earth’s finite natural resources endowments. There is a failure to realize that the unsustainable utilization of our natural resources undermines our very human existence.

In grappling with our socio-economic cultural problems and the complex relationship between the environment and good governance, we must not ignore the linkages between landlessness, land tenure, cultural practices and habits, land titled, land use, and natural resources management, which must be at the heart of policy options must be at the heart

of policy options in environmental, constitutional law and human rights litigation such as this one. While we discuss rights in a macro-economic context, sight cannot be lost of the legal and constitutional effects on the environment. A narrow legalistic interpretation of human rights and enforcement of absolute individual rights may only take away a hospitable environment necessary for the enjoyment of those very human rights. A sure enforcement of legal rules for environmental governance and management of our natural resources, is the only guarantee for our very survival and enjoyment of our individual and human rights.

At present the ultimate responsibility and task of good management of our natural resources lies with the Government, with the help and co-operation, of course, of individuals and groups of civil society, including the Church. Good environmental governance will succeed or fail, depending on how we all share the responsibility for managing the rules of natural resource management, the monitoring and evaluation and re-evaluation of existing forms of coping with environmental conservation and development, and depending on the feedback which must be accessed at all times, the appropriate reformulation and rigorous enforcement of the relevant rules. It is an increasingly complex exercise which must involve many actors at all times. And if as we urge the upholding of human rights in their purest form we do not integrate environmental considerations into our human and property rights, then we, as a country are headed for a catastrophe in a foreseeable future. Integrate environmental considerations in our arguments for our clients' human and property rights systems are rooted, cultivated and exploited for short term political, economic or cultural gains and satisfaction for a mere maximization of temporary economic returns, based on development strategies and legal arrangements for land ownership use and exploitation without taking account of ecological principles and the centrality of long-term natural resources conservation rooted in a conservation national ethic.

In 21st Century, Kenya, land ownership, land use, one's right to live and one's right to livelihood, are not simply economic and property questions, naked individual rural rights or a matter of politics. All these, and more, are questions of the sustainable use of natural resources for the very survival of mankind before he can begin to claim those "fundamental rights". the old individualistic models of development and property has no place in to-day's socio-economic and political strategies. to-day it is startling to hear arid legal arguments putting excessive emphasis on the recognition and protection of group or private property rights, at the expense of the corresponding duty of ecological stewardship to jet long-term national expectations which humanity must place in land to guarantee the survival of everyone. The integration of environmental factors into growth strategies and legal argument about human rights, must be the core to all programmes, policies and the administration of justice. Without such integration we all lose humanity's supportive

environment and we might not be alive to pursue the right to live, let alone the right to live in the Tinet Forest.

Indeed, a legal system which provides extensive and simplified procedures for converting public land to private ownership, or which gives a reckless access to public natural resources, with little or no regard for ecological and sustainable social developmental impacts, is a national enemy of the people. We must all be ecological ignorance free; and a justice system which does not uphold efforts to protect the environment for sustainable development is a danger to the enjoyment of human rights. The real threat to these human rights is the negative environmental eviction orders in themselves. The real threat to these human rights is the negative environmental effect of ecological mismanagement, neglect and the raping of the resources endowed unto us by Mother Nature, which are the most fundamental of all human rights: the right to breathe fresh air from the forests so that we can live to hunt and gather; the right to drink clean water so that we can have something to sweat after hunting and gathering. Hence, the importance of the issue of preserving the rain water catchment area.

We have found from the evidential materials before us in the case, that Sururu, Likia and Teret, among others, were homes for persons who seeped back into Tinet Forest and are now crying foul when they are being evicted by Government for the umpteenth time. It is not being forthright to say they known no other home to go back to.

We have found that there is no proof by the Plaintiffs of lawful re-entry after the various evictions. They have simply kept on re-entering and re-occupying, only to be met with repeated evictions.

The pre-European history of the Ogiek and the Plaintiffs was not presented to us in court, to enable us determine whether their claim that they were in Tinet Forest from time immemorial is well-founded. We only meet them in the said forest in the 1930's. Such recent history does not make the stay of the Ogiek in the Tinet Forest dateless and inveterate (as we understand the meaning of the expression "immemorial" in this context); and nothing was placed before us by the way of early history to give them an ancestry in this particular place, to confer them with any land rights. Remember, they are a migratory people, depending on the climate.

The pretensions of to-day's Ogiek to conserve the forest when he has moved away from his age-old pre-food-producing past which was environmentally friendly, are short of candidness. They have taken to different socio-economic pursuits which may be inimical to forest conservation.

The Government action complained of does not contravene the rights of the plaintiffs to the protection of the law, not to be discriminated against, and to reside in any part of

Kenya: it is themselves who seek to confine themselves in one forest only.. Their right to life has not been contravened by the forcible eviction from the forest: it is themselves who wish to live as outlaws with not respect for the law conserving and protecting forests. It is themselves who do not want the public forest protected to sustain their lies and those of others. They were compensated by an exchange of alternative lands for this forest.

The upshot of everything we have said from the beginning of this judgment up to this point is that the eviction is for the purposes of saving the whole Kenya from a possible environmental disaster, it is being carried out of the common good within statutory powers; it is aimed at persons who have made home in the forest and are exploiting its resources without following the statutory requirements, and they have alternative land given them ever since the colonial days, which is not shown to be inhabitable. We find that if any schools, churches, market places have been developed, they are incompatible with the purposes for which national forest are preserved, and without following the law to put them up; the applicants have acknowledged the rights of the Government in and over the forest. There was no evidence of a discriminatory treatment of the applicants against them on ethnic or other

improper grounds. No case was made out for compensation to be given once more. The plaintiffs can live anywhere in Kenya, subject to the law and the rights of others.

For these reasons the court dismisses all the prayers sought. Allow us to add that any other determination would be of mischievous consequences for the country, and must lead to an extent to prodigious vexatious litigation, and, perhaps to interminable law suits. It would be a fallacious mode and an unjustifiable mode of administering justice between parties and for the public good of this country. In the context of this case, we know no safe way for this country and for these litigants, than dismissing this case with costs to the respondents. We so order.

Signed and dated by both of us at Nairobi, this 23rd day of March, 2000.

Samuel O. Oguk

Richard Kuloba

(Judge)

(Judge)

**23/3/2000**

**23/3/2000**



**VI**

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***Animal Protection***

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**IN THE HIGH COURT OF SOUTH AFRICA WITWASRAND LOCAL DIVISION)**  
JOHANNESBURG 30 July 1999 BEFORE THE HONOURABLE JUDGE NGENT

In the matter between:-

LEONARDIA SAFARIS

*Applicant*

*and*

PREMIER VAN DIE PROVINSIE GAUTENG

1<sup>st</sup> Respondent

LID VAN DIE UITVOERENDE RAAD VIR LAND BOU EN DIE OMGEWING

2<sup>nd</sup> Respondent

HAVING read the documents filed of record and having considered the matter:

IT IS ORDERED:

1. That the Application be and is hereby dismissed with costs.

BY OTHE OCURT

REGISTRAR  
Inva

**IN THE HIGH COURT OF SOUTH AFRICA (WITWATERSRAND LOCAL DIVISION)**  
**JOHANNESBURG**

CASE NO: 98/18201

DATE: 30 JULY 1999

In the matter between:

LEONARDO SAFARIS

*Applicant*

*and*

THE PREMIER OF THE GAUTENG PROVINCE

First Respondent

MEMBER OF THE EXECUTIVE COMMITTEE FOR AGRICULTURE,  
CONSERVATION AND THE ENVIRONMENT OF THE PROVINCE OF  
GAUTENG

Second Respondent

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## JUDGEMENT

NUGENT, J: Situated as it is in the country's commercial heartland, this court does not often deal with cases concerning rhinoceroses. However that is what forms the subject of the present application. To be more precise it is a black rhinoceros, which is at present resident in Potgietersrus.

The applicant, who is a professional hunter, wishes to import the this Province and take it to a farm near Vereeniging. He has a client who wishes to shoot it. What is sought in this application is an order compelling the authorities to issue the relevant permits which will enable him to do so.

I am not called upon in this case to adjudicate upon the desirability, or otherwise, of shooting rhinoceroses in general, or this one in particular. The issues in this case fall within the more prosaic field of administrative law.

Before turning to the issues I need to describe briefly how the issues arose. The black rhinoceros which is the subject of this case is originally from the Addo National Park. Because of some doubt about its heritage it was not considered fit for breeding and was accordingly donated to the National Zoological Gardens and has been kept at the Game Breeding Centre at Potgietersrus since 1983.

In 1998 the National Zoological Gardens sold the animal to a firm known as Tracy and Du Plessis Game Capture. That firm then arranged with the applicant for the animal to be made available to be hunted. I might mention that according to the respondents affidavits it was never disclosed to the National Zoological Gardens at the time of the sale that the animal was to be shot. Had that been disclosed, according to the affidavits of the respondents, the sale would not have taken place. Whether that is indeed so is not material to this application.

In order to import the animal into this Province and then to shoot it, which is what the applicant intends doing, two permits are required. Section 41 of the Nature Conservation Ordinance No. 12 of 1983 prohibits the importation of any live wild animal except under the authority of a permit. Section 16A of the Ordinance prohibits the hunting of specially protected game (which includes the black rhinoceros) except under the authority of a permit. In terms of section 100 of the Ordinance the authority to issue such permits vests in the Administrator of the Province (now the Premier of the Province) who may -

“Upon application and payment of the prescribed fee issue to any person a licence, permit or exemption provided for in this Ordinance.”

Undoubtedly the Premier may delegate that authority and has in fact done so in this case. The precise terms of the delegation of such powers are not before me but it is not in

dispute that such powers may be exercised by the head of the Department of Agriculture, Conservation and Environment. It is also alleged by the applicant that these powers may be exercised by the Director of Nature Conservation. Whether or not that is so is not material to this case because it is common cause that the Director of Nature Conservation in any event has not exercised any such powers.

At the time which is relevant to this application the Director of Nature Conservation was a certain Mr. Fourie. He reported to a Chief Director who in turn reported to the Head of the Department who is a certain Mrs. Hanekom. Also employed in the department was a certain Mr. Schoeman who was a Deputy Director. Both Mr. Fourie and Mr. Schoeman have since left the employ of the Provincial Administration and have deposed to affidavits in support of the application.

On 2 June 1998 Tracy and Du Plessis wrote to Mr. Schoeman in the following terms:

“Aansoek vir jagpermit van Renoster. Hiermee 'n aansoek vir de nodige Cites permit vir die jag van 'n swart renoster wat nie vir teelddoeleindes gebruik kan word nie.  
Mnr L Buys van Leonardia Safaris wil dit graag doen met 'n buitelande kliën.”

I have already indicated that the Director of Nature Conservation at that time was Mr. Fourie. Although he alleges that he was in general entitled to grant the authority which had been sought by Tracy and Du Plessis, what is common cause is that he declined to exercise any such authority that he might have had.

The matter was discussed at a meeting of the directorate and it was decided, apparently because the shooting of rhinoceroses is regarded as a sensitive matter, that it should be referred to the head of the department in order for her to make the appropriate decision. There is a dispute as to whether Mrs. Hanekom did in fact make the relevant decision. Mr. Fourie alleges that he prepared a memorandum which he sent to Mrs. Hanekom and that she gave her approval for the issue of such a permit. That is denied by the respondents and the applicant's counsel accepted, correctly, that in view of that dispute, which cannot be resolved on these papers, the matter falls to be disposed of as if no such approval was given by Mrs. Hanekom.

What is important to bear in mind, however, is that on neither version was a permit actually issued. At best for the applicant Mrs. Hanekom gave authority for such a permit to be issued at some time in the future.

On 24 June 1998 Mr. Schoeman wrote a letter addressed to “Whom it may concern” which reads as follows:

“The Directorate of Nature Conservation hereby confirms that a permit for the hunting of a redundant black rhinoceros has been approved for

Leonardia Safaris. The issue of a Cites export permit is subject to the obtaining of a Cites import permit from the country where the trophy is destined for”.

That letter came into the hands of the applicant. On the strength of that letter the applicant purchased the animal from Trace and Du Plessis, subject to the suspensive condition that he was able to sell it to a third party, and he then set about finding a client who wished to shoot the rhinoceros. It was envisaged that the “hunt” in which this would occur would be arranged on a farm near Vereeniging to which the animal was to be transported.

The applicant was indeed successful in locating such a person, who is a gentleman from Paris. This details of the client were submitted to the authorities to enable a permit to be issued. A permit for the export of the animal from the North West Province has been secured, the validity of which is dependent upon an import permit being granted for its importation at the place of destination.

On 19 July 1998 an official of the department informed the applicant that a permit for the shooting of the animal had been refused. No reasons were given at that stage but in response to a letter from the applicant’s attorney, Mrs. Hanekom wrote a letter giving her reasons for her decision. Amongst other things she said the following:

“Also the Conservation on the International Trade in Endangered Species (CITES) lists black rhino under Appendix 1 which means that no international trade in this species may take place unless a quota was agreed upon by the conference of parties. Gauteng does not have a quota for the hunting or export of black rhino to other countries, so we would not be able to approve of the export of either the live animal nor the trophy. Cites further indicates that if the country has a “problem” animal which is also listed under Appendix 1, the country may as a management measure dispose of the animal. For example, to have the animal put down by an official. Professional hunting is a commercial activity and it is excluded.

In the light of the above I must unfortunately reject your application for the importing and hunting of a black Rhino in Gauteng”.

The refusal to issue the relevant permits has resulted in the present application in which orders are sought, firstly, setting aside the refusal to grant the permits and, secondly, compelling the respondents’ officials to grant the permits. It is alleged to be urgent because the client concerned is already in this country and the venture has been arranged to take place some time in August. The applicant alleges that he will lose a considerable amount of money if the venture is not pursued.

Given the constraints of time which are imposed upon me by this and many other applications to be dealt with in the

urgent court this week, I do not intend dealing with all the Arguments that were advanced in this matter but will concentrate only on those which, in my view, are decisive:

In reliance upon the letter written by Mr. Schoeman, the applicant submitted that he was assured that approval had been granted for the issue of the necessary permits, and that the authorities are accordingly now obliged to issue them. Some reliance was sought to be placed upon the doctrine of estoppel to provide the legal basis for that claim, but counsel recognized the limitations of that doctrine and accepted, correctly, in my view, that it could not operate so as to compel the respondents to issue the relevant permits. Because that argument advanced by counsel was accepted as not being decisive of this matter, I do not intend dealing with it in any further detail.

The core of the further argument came down to this: It was submitted that by informing the applicant that approval had been granted for the issue of the relevant permits, Mr. Schoeman had given rise to a legitimate expectation that such permits would be granted, and that the respondents were accordingly obliged to do so.

I think that, like many other labels which are used in various areas of the law, the term “legitimate expectation” is often thought to be a remedy for all ills without recognizing its limitations. The term came to be introduced into the legal parlance of this country in Administrator of the Transvaal v Traub and Others 1989 (4) SA 731 (A). It was introduced in the context of determining in what circumstances the rules of natural justice, and in particular the audi alteram partem rule, applies. Corbett CJ pointed out at 748G that:

“The classic formulation of the principle states that when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken... One of the issues in this matter is whether what I shall call the ‘audi principle’ is confined to cases where the decision affects the liberty, property or existing rights of the individual concerned or whether the impact of the principle is wider than this”.

As indicated in that passage, the position until then had been that the courts recognized the application of the rules of natural justice only in cases in which accrued rights were affected by any decision made by an administrative official. In that case it was decided that the rules of natural justice were applicable not only where accrued rights were concerned, but also where the person concerned had some “legitimate expectation” which he should not be deprived of without a fair administrative process. The proper application of the doctrine appears from page 754J of the report in which the following was said, relying upon the speech of the House of Lords in Ridge v Baldwin & Others, in which the following passage was adopted:



“...an administrative body may, in a proper case, be bound to give a person who is affected by their decision and opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.”

There is no suggestion in that case that a person is entitled to be granted a right merely because he has a “legitimate expectation” that it will be granted. Nor am I aware of any decision in this country, or in the United Kingdom, in which it has been held that rights may be created by a “legitimate expectation” that they would come into existence. At most it has been held that a person might not be deprived of a legitimate expectation of being accorded a right without a fair administrative process.

Accordingly, even if the applicant had a “legitimate expectation” of being granted the permits, I know of no legal principle in this country which provides the foundation for the actual acquisition of those rights. Perhaps he was entitled to be heard, and to have a fair administrative process adhered to, in the decision-making process as to whether a permit should be issued, but that is not what the complaint is in the present case.

I was invited by counsel to take the unprecedented step of recognizing such a legal principle in this case, but I think I should decline that invitation. There are, in my view, considerations of fundamental principle which bear upon any decision to take the step, on which I have heard no argument at all in this case. I might add that even if I were to be of the view that there are indeed cases in which a right might come into existence because a legitimate expectation has been created, in my view, this is not a case in which I would apply it. I do not think that the applicant can be said to have had any such legitimate expectation at

all. As I have already indicated, I must accept for present purposes that Mr. Schoeman had no authority to write the letter in the first place. I cannot see how a right can be created by the promise of a person who was unauthorized to give it in the first place.

Furthermore, the applicant was told no more than that the approval had been granted for a permit, not that a permit had in fact been issued. In terms of section 100(3) of the Ordinance, the Administrator (now the Premier) may at any time suspend or withdraw any permit which he might have issued in terms of the Ordinance. If the permit itself might at any time be suspended, or withdrawn, or cancelled, I cannot see on what basis the applicant could have a legitimate expectation that an “approval in principle”, as it was called in argument, could not similarly be withdrawn. Accordingly, even assuming that Mrs. Hanekom had indeed granted the approval, I cannot see that the applicant had a legitimate expectation that this would in due course be converted into an irrevocable permit.

Counsel has asked for the matter to be referred to evidence on the question of whether Mrs. Hanekom did indeed exercise her authority. I can see no purpose in doing so. As I have indicated, even if Mrs. Hanekom did exercise her authority, I do not think that it created entitlement to the issue of a permit. Perhaps the applicant is entitled to damages for having been led to believe that a permit would be issued, but that is another matter.

Finally, there was some suggestion that the refusal to issue the permits was unreasonable or capricious and that the court should intervene. That submission based on no more than bald allegations to that effect with no substantial basis at all.

In my view there is no merit in this application and it is dismissed with costs.

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**ENVIRONMENTAL FOUNDATION LIMITED  
VS.  
RATNASIRI WICKRAMANAYAKE, MINISTER OF PUBLIC ADMINISTRATION  
AND TWO OTHERS**

The South Asian Law Reporter Vol 3(4) Dec 1996  
Court of Appeal of Sri Lanka  
C.A. Application No.137/96

Before: Dr Ranaraja J.

Counsel: Lalanath De Silva with Mihiri Gunawardena for Petitioner

K.C. Kamalabeyan P.C., Additional Solicitor-General, with S. Sri Skandarajah,  
Senior State Counsel, for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

F. Mustapha P.C. for 3<sup>rd</sup> Respondent

Decided: 17 December 1996

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Application originally filed by Petitioner for writ of certiorari to quash order of 2<sup>nd</sup> Respondent (Director, Department of Wildlife Conservation) permitting 3<sup>rd</sup> Respondent to display 30 species of animal at a private zoo - subsequent cancellation of licence due to alleged violation of terms and conditions - appeal by 3<sup>rd</sup> Respondent to 1<sup>st</sup> Respondent (the Minister) - decision of 1<sup>st</sup> Respondent, purportedly exercising his powers under the Fauna and Flora Protection Ordinance, to restore the licence provided conditions were adhered to - application by Petitioner to quash this subsequent order as being illegal - question of Petitioner's locus standi

The Petitioner was a public interest law firm dedicated to the protection of nature and the conservation of its riches. It had previously filed an application No.993/94 for a writ of certiorari to quash the order of the 2<sup>nd</sup> Respondent, the Director, Department of Wildlife Conservation, permitting the 3<sup>rd</sup> Respondent to possess and display 30 species of mammals, reptiles and birds at a private zoo. Subsequent to the filing of that application, the 2<sup>nd</sup> Respondent had revoked the permit allegedly for breach of the conditions on which it had been issued. However the 3<sup>rd</sup> Respondent appealed to the 1<sup>st</sup> Respondent Minister, who restore the permit on condition that its terms and conditions would be adhered to.

The Petitioner then withdrew its earlier application and filed the present application, repeating the prayer in its earlier application (relief "a") and adding a further prayer for a writ of certiorari to quash the decision of the 1<sup>st</sup> Respondent restoring the permit (relief "b"). The Petitioner also prayed for a writ of mandamus compelling 2<sup>nd</sup> Respondent to seize the animals at the zoo which may be produced in evidence in terms of the Fauna and Flora (Protection) Ordinance (relief "c"), and a writ of mandamus compelling the 2<sup>nd</sup> Respondent to prosecute and otherwise enforce the law against the 3<sup>rd</sup> Respondent for the commission of offences under the Fauna and Flora (Protection) Ordinance as amended by Act No. 49 of 1993 (relief "d").

The Petitioner's contention was that Section 55 of the Ordinance which allows the Director of Wildlife Conservation to authorize any person to do an act which is otherwise prohibited under the Ordinance, related only to acts for the protection, preservation or propagation, or scientific study and investigation, or for the collection of specimens for a national zoo, museum or other similar institution, of the fauna and flora of Sri Lanka. The word "national" had been added before the word "zoo" only by the Fauna and Flora Protection (Amendment) Act No, 49 of 1993 which was certified on 20 October 1993.

The Respondents at the outset took up a preliminary objection that the Petitioner has no locus standi to make this application. The 1<sup>st</sup> Respondent also stated that his restoration of the 3<sup>rd</sup> Respondent's permit had been made prior to the certification of the Fauna and Flora Protection

(Amendment) Act which statement was not challenged by the Petitioner.

- (1) As the Petitioner was a party genuinely interested in the matter complained of, it had the locus standi to make this application.
- (2) In terms of Section 56(2) of the Fauna and Flora Protection Ordinance, the 1<sup>st</sup> Respondent was the proper authority to whom a person aggrieved by the revocation of a permit of licence had a right of appeal.
- (3) The section provides that the decision of the Minister shall be final and conclusive, and accordingly, in terms of Section 22 of the Interpretation Ordinance, the Court could not interfere unless the order made was ex facie not within the power conferred on the person making it, or the person making the decision had not followed some mandatory rule of law or had failed to observe the rules of natural justice. The Petitioner had not satisfied Court that either the 1<sup>st</sup> or 2<sup>nd</sup> Respondent had acted in such a fashion.
- (4) If the 3<sup>rd</sup> Respondent, as alleged by the Petitioner, had breached the conditions of his permit, the Petitioner had the right to make representations to the 2<sup>nd</sup> Respondent for necessary action. Since the Court was not in a position to monitor the breach of conditions of the permit, it would not make orders it could not effectively enforce.
- (5) The Petitioner had accordingly failed to establish sufficient grounds for the grant of reliefs prayed for in prayers "a" and "b" and the other reliefs claimed by the Petitioner stemmed for these prayers. The application was therefore dismissed without costs.

#### Cases cited:

Premadasa vs. Wijewardena (1991) 1 S.L.R. 333  
 Simon Singho vs. Government Agent, W.P. 47 N.L.R. 545  
 Wijesiri vs. Siriwardena (1982) 1 S.L.R. 171  
 R. vs. Paddington Valuation Officer (1966) 1 Q.B. 380  
 R. vs. Thames Magistrates Court (1957) 55 L.G.R. 129  
 Re Forster (1863) 4 B. & S. 187  
 Samalanka Ltd. vs. Weerakoon (1994) 1 S.L.R. 405

Dr. Ranaraja J.

The petitioner Environmental Foundation Ltd., a public interest environmental law and advocacy organization, has filed this application, inter alia:

- 1) for a writ of certiorari quashing the authorization (1R1) issued by the 2<sup>nd</sup> Respondent, the Director, Department of Wildlife Conservation, to the 3<sup>rd</sup> Respondent, Masahim Mohamed, to possess and display 30 species of mammals, reptiles and birds specified therein
- 2) for a writ of certiorari quashing the decision of the 1<sup>st</sup> Respondent, the Minister of Public Administration, conveyed by letter dated 22.09.1995

(2R17) to restore permit No. Va/Sa/San/1/5/62, dated 27.08.1993 (1R1), subject to the restriction of species and number of animals which could be kept by the 3<sup>rd</sup> Respondent under the conditions stipulated in the permit.

The 3<sup>rd</sup> Respondent is the owner of a private zoo called “Crocodiles and Mini Zoo”, Galle Road, Ahungalla, on 1R1 issued by the 2<sup>nd</sup> Respondent. The zoo is open to the public on payment of an entrance fee of Rs.15/2 and Rs.100/2 from local and foreign visitors respectively. The permit lists 30 species of mammals, reptiles and birds and the number of each species of mammals, reptiles and birds listed in 1R1, except for the purpose of protection, preservation, propagation or for scientific study or investigation. Only a national zoo, if it is submitted, may be allowed such an exemption. The Petitioner contends that in the circumstances, 1R1 that has been issued by the 2<sup>nd</sup> Respondent is illegal, null and void. The Petitioner has also alleged that the 3<sup>rd</sup> Respondent has in his possession a sloth bear not included in the permit, and five pythons in excess of the number permitted by 1R1, and that the permit should be revoked in terms of condition no.6.

The petitioner filed an earlier application No.933/94 before this court, seeking, inter alia, a writ of certiorari quashing 1R1. While that application was pending, the permit 1R1 was revoked by letter dated 27.05.1995 (B), sent by the 2<sup>nd</sup> Respondent to the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent appealed to the 1<sup>st</sup> Respondent against order (B) by letter dated 01.08.1995(3R2/1R1). The 1<sup>st</sup> Respondent, after calling and considering the reports from the 23<sup>rd</sup> Respondent, the Secretary and the Additional Secretary of his Ministry, had decided to restore 1R1 on condition that the species and the number of animals kept in the 3<sup>rd</sup> Respondent’s possession should be restricted to the species and number specified in the permit. That decision was conveyed to the 3<sup>rd</sup> Respondent by 2R17/3R3. On application made by the Petitioner to withdraw Application No.933/94, which was allowed, that application was dismissed.

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have taken a preliminary objection that the Petitioner has no locus standi to make the present application. He submits that “the law as to locus standi to apply for certiorari may be stated as follows: the writ can be applied for by an aggrieved party, who has a grievance, or by a member of the public. If the applicant is a member of the public, he must have sufficient interest to make the application” :**Premadasa v. Wijewardena**, (1991) 1 S.L.R. 333 at 343. Locus standi in relation to mandamus is more stringent. The petitioner must have a personal interest in the subject matter of the application: **Simon Singho v. Government Agent, W.P.**, 47 N.L.R.545.

Counsel for the Petitioner, on the other hand, submits that the Petitioner has its objective the protection of nature and the conservation of its riches (Vide P1, P2, P3). It is

genuinely concerned with the implementation and enforcement of the law relating to nature, its conservation and the environment in general, and is performing a duty case on it by Article 28(f) of the Constitution of Sri Lanka, to protect nature and conserve its riches. It is to be noted, however, that Article 29 of the Constitution provides that the provision of Chapter VI do not confer or impose legal rights or obligation and are not enforceable in any court or tribunal.

However, there are decisions both here and abroad which have expanded the principle of locus standi to include an applicant who can show a genuine interest in the matter complained of, and that he comes before court as a public-spirited person, concerned to see that the law is obeying the interest of all: See **Wijesiri v. Siriwardena**, (1982) 1 S.L.R. 171. Unless any citizen has standing there is no means of keeping public authorities within the law unless the Attorney General will act - which frequently he will not. That private persons should be able to obtain some remedy therefore “a matter of high constitutional principle”: Lord Denning, MR - **R v. Paddington Valuation Officer** (1966) 1 Q.B. 380. Nevertheless, the Court would not listen to a mere busybody who was interfering in things which did not concern him, but will listen to anyone whose interest are affected by what has been done: See **R. v. Paddington** (supra). In any event, if the application is made by what for convenience one may call a stranger, the remedy is purely discretionary: See Parker J in **R. v. Thames Magistrates Court** (1957) 55 L.G.R. 129. Court retains a discretion to refuse to act at the instance of a mere stranger, if it considers that no good would be done to the public: See **Re Forster** (1863) 4 B.&.S. 187. As a party genuinely interested in the matter complained of, the Petitioner has the locus standi to make this application.

The Petitioners complain is the Section 55 of the Fauna and Flora Protection Ordinance No.2 of 1937 permits the 2<sup>nd</sup> Respondent by a writing under his hand, to authorize any person to do any act otherwise prohibited or penalized under the Ordinance or any regulation made thereunder, if , in the opinion of the 2<sup>nd</sup> Respondent, such act should be authorized for the protection, preservation or propagation, or for scientific study or investigation, or for the collection of specimens for a zoo, museum or similar institution, of the fauna and flora of Sri Lanka. By the Fauna and Flora Protection (Amendment) Act No.49 of 1993, certified on 20.10.1993, the words “for a zoo” have been replaced by the words “for a national zoo”. The 3<sup>rd</sup> Respondent’s zoo is a private zoo. Therefore, it is contended, the permit 1R1 issued by the 2<sup>nd</sup> Respondent is illegal, null and void.

The 1<sup>st</sup> Respondent has affirmed that the permit 1R1 was issued prior to the certification of the Fauna and Flora Protection (Amendment) Act. This statement of the 1<sup>st</sup> Respondent has not been challenged by the Petitioner by way of affidavit. Upon the revocation of 1R1 by the 2<sup>nd</sup> Respondent, the 3<sup>rd</sup> Respondent has appealed to the 1<sup>st</sup> Respondent, who, as submitted by the Petitioner in

paragraph 6 of the petition, is the appellate authority for the purpose of permits and licences under Section 56 of the Ordinance. In paragraph 8 of the petition files in Application No.933/94, “(a)”, the Petitioner has admitted that 1R1 was a “permit” issued by the 2<sup>nd</sup> Respondent to the 3<sup>rd</sup> Respondent to possess and display 30 species of mammals, reptiles and birds specified in the said permit, (vide clause 6 of 1R1).

Section 56(2) gives any person aggrieved by the revocation of a permit or licence the right of appeal against such revocation the Minister, and a decision of the Minister on any appeal under Section 56(2) shall be final and conclusive in terms of Section 56(4). In view of the preclusive clause, this Court will not and cannot interfere with such an order except in the circumstance set out in Section 22 of the Interpretation Ordinance. That is, where (a) the order made is *ex facie* not within the power conferred on the person making such decision; (b) the person making such decision has not followed a mandatory rule of law; or (c) failed to observe rules of natural justice in the process of making such decision: See *Samalanka*

*Ltd. v. Weerakoon* (1994) 1 S.L.R. 405. The petitioner has not satisfied this Court that either the 1<sup>st</sup> or 2<sup>nd</sup> Respondent has acted contrary to (a) to (c) above. Reliefs “c” and “d” claimed by the Petitioner stem from reliefs “a” and “b”. If the 3<sup>rd</sup> Respondent has breached the condition in 1R1, by either possessing mammals, reptiles and birds in excess of the number permitted by 1R1 or keeping the sloth bear without authorisation of the 2<sup>nd</sup> Respondent, the Petitioner will in any event have the right, as it has already done, to make representations to the 2<sup>nd</sup> Respondent for necessary action in terms of clause 6 of 1R1. Since breach of the conditions in 1R1 is a matter which Court is not in a position to monitor continuously, primarily because of the natural increase by breeding - (vide 3R4), it will not make orders it cannot effectively enforce. Reliefs “e”, “f” and “g” are matters preliminary to the hearing of the application. Since the Petitioner has failed to establish sufficient grounds for reliefs “a” and “b”, the application is dismissed without costs.

(Sgd)

Judge of the Court of Appeal



***D***

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***Cases in French***

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## COUR EUROPEENNE DES DROITS DE L'HOMME

En l'affaire **López Ostra** c. Espagne\*,

La Cour européenne des Droits de l'Homme, constituée, conformément à l'article 43 (art. 43) de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales («la Convention») et aux clauses pertinentes de son règlement A\*\*, en une chambre composée des juges dont le nom suit:

MM. R. Ryssdal, président, R. Bernhardt, A. Spielmann, Mme E. Palm, MM. J.M. Morenilla, F. Bigi, A.B. Baka, M.A. Lopes Rocha, G. Mifsud Bonnici, ainsi que de M. H. Petzold, greffier f.f.,

Après en avoir délibéré en chambre du conseil les 24 juin et 23 novembre 1994,

Rend l'arrêt que voici, adopté à cette dernière date:

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### Notes du greffier

\* L'affaire porte le n° 41/1993/436/515. Les deux premiers chiffres en indiquent le rang dans l'année d'introduction, les deux derniers la place sur la liste des saisines de la Cour depuis l'origine et sur celle des requêtes initiales (à la Commission) correspondantes.

\*\* Le règlement A s'applique à toutes les affaires déférées à la Cour avant l'entrée en vigueur du Protocole n° 9 (P9) et, depuis celle-ci, aux seules affaires concernant les Etats non liés par ledit Protocole (P9). Il correspond au règlement entré en vigueur le 1er janvier 1983 et amendé à plusieurs reprises depuis lors.

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**PROCEDURE**

1. L'affaire a été déférée à la Cour par la Commission européenne des Droits de l'Homme («la Commission») le 8 décembre 1993, dans le délai de trois mois qu'ouvrent les articles 32 par. 1 et 47 (art. 32-1, art. 47) de la Convention. A son origine se trouve une requête (n° 16798/90) dirigée contre le Royaume d'Espagne et dont une ressortissante de cet Etat, Mme Gregoria **López** Ostra, avait saisi la Commission le 14 mai 1990 en vertu de l'article 25 (art. 25).

La demande de la Commission renvoie aux articles 44 et 48 (art. 44, art. 48) ainsi qu'à la déclaration espagnole reconnaissant la juridiction obligatoire de la Cour (article 46) (art. 46). Elle a pour objet d'obtenir une décision sur le point de savoir si les faits de la cause révèlent un manquement de l'Etat défendeur aux exigences des articles 3 et 8 (art. 3, art. 8) de la Convention.

2. En réponse à l'invitation prévue à l'article 33 par. 3 d) du règlement A, la requérante a manifesté le désir de participer à l'instance et a désigné son conseil (article 30). Le 10 janvier 1994, le président a autorisé ce dernier à utiliser la langue espagnole dans la procédure (article 27 par. 3).

3. La chambre à constituer comprenait de plein droit M. J.M. Morenilla, juge élu de nationalité espagnole (article 43 de la Convention) (art. 43), et M. R. Ryssdal, président de la Cour (article 21 par. 3 b) du règlement A). Le 24 janvier 1994, ce dernier a tiré au sort le nom des sept autres membres, à savoir M. R. Bernhardt, M. J. De Meyer, Mme E. Palm, M. F. Bigi, M. A.B. Baka, M. M.A. Lopes Rocha et M. G. Mifsud Bonnici, en présence du greffier (articles 43 in fine de la Convention et 21 par. 4 du règlement A) (art. 43). Par la suite, M. A. Spielmann, juge suppléant, a remplacé M. De Meyer, empêché (articles 22 paras. 1 et 2 et 24 par. 1 du règlement A).

4. En sa qualité de président de la chambre (article 21 par. 5 du règlement A), M. Ryssdal a consulté, par l'intermédiaire du greffier, l'agent du gouvernement espagnol («le Gouvernement»), l'avocat de la requérante et le délégué de la Commission au sujet de l'organisation de la procédure (articles 37 par. 1 et 38). Conformément aux ordonnances rendues en conséquence, le greffier a reçu les mémoires du Gouvernement et de la requérante les 3 et 4 mai 1994 respectivement. Le 16 mai, le secrétaire de la Commission l'a informé que le délégué s'exprimerait en plaidoirie.

Les 10, 17 et 20 juin 1994, la Commission a fourni divers documents que le greffier avait sollicités sur les instructions du président.

5. Ainsi qu'en avait décidé le président - qui avait aussi autorisé l'agent du Gouvernement à s'exprimer en espagnol à l'audience (article 27 par. 2 du règlement A) -, les débats

se sont déroulés en public, le 20 juin 1994, au Palais des Droits de l'Homme à Strasbourg. La chambre avait tenu auparavant une réunion préparatoire.

Ont comparu:

pour le Gouvernement: M. J. Borrego Borrego, chef du service juridique des droits de l'homme, ministère de la Justice, agent;

pour la Commission M. F. Martínez, délégué;

pour la requérante Me J.L. Mazón Costa, avocat, conseil.

La Cour les a entendus en leurs déclarations, ainsi qu'en leurs réponses aux questions de deux de ses membres.

Le 23 novembre 1994, elle a écarté pour tardiveté des observations présentées par le conseil du requérant le 13 octobre 1994 et relatives au remboursement de ses honoraires dans les procédures internes.

**EN FAIT**

6. De nationalité espagnole, Mme Gregoria **López** Ostra réside à Lorca (Murcie).

A l'époque considérée, elle habitait avec son époux et leurs deux filles dans le quartier «Diputación del Rio, el Lugarico», situé à quelques centaines de mètres du centre de Lorca.

**I. Les circonstances de l'espèce***A. Genèse de l'affaire*

7. La ville de Lorca réunit une forte concentration d'industries du cuir. Plusieurs tanneries qui y étaient installées, au sein d'une société anonyme nommée SACURSA, firent construire sur des terrains appartenant à la commune et avec une subvention de l'Etat une station d'épuration d'eaux et de déchets, qui se trouvait à douze mètres du domicile de la requérante.

8. La station démarra ses activités en juillet 1988 sans avoir obtenu au préalable le permis (licencia) de la mairie, comme l'exige l'article 6 du règlement de 1961 relatif aux activités classées gênantes, insalubres, nocives et dangereuses («le règlement de 1961»), et sans que la procédure établie à cette fin eût été suivie (paragraphe 28 ci-dessous).

Sa mise en marche causa des émanations de gaz, odeurs pestilentielles et contaminations (dues à son mauvais fonctionnement), qui provoquèrent immédiatement des troubles de santé et nuisances à de nombreux habitants de Lorca, notamment à ceux du quartier de la requérante. Le conseil municipal évacua les résidents de ce quartier et les

relogea gratuitement au centre ville pendant les mois de juillet, août et septembre 1988. En octobre, la requérante et sa famille regagnèrent leur appartement; ils y habitèrent jusqu'en février 1992 (paragraphe 21 ci-dessous).

9. Le 9 septembre 1988, à la suite de nombreuses plaintes et au vu des rapports des autorités sanitaires et de l'Agence pour l'environnement et la nature (Agencia para el Medio Ambiente y la Naturaleza) de la région de Murcie, le conseil municipal ordonna l'arrêt de l'une des activités de la station, la décantation de résidus chimiques et organiques dans des bassins d'eau (lagunaje), tout en maintenant celle d'épuration des eaux résiduelles souillées au chrome.

Les effets de cet arrêt partiel d'activités sont controversés, mais il ressort des rapports d'expertise et témoignages écrits des années 1991, 1992 et 1993, produits devant la Commission par le Gouvernement et la requérante (paragraphe 18-20 ci-dessous), que certaines nuisances persistent, qui peuvent constituer un danger pour la santé des riverains.

#### *B. Le recours en protection des droits fondamentaux*

##### 1. La procédure devant l'Audiencia Territorial de Murcie

10. La tentative pour trouver une solution auprès de la mairie ayant échoué, Mme **López Ostra** saisit l'Audiencia Territorial (chambre administrative) de Murcie le 13 octobre 1988 d'un recours en protection de ses droits fondamentaux (article 1 de la loi 62/1978 du 26 décembre 1978 sur la protection des droits fondamentaux, «loi 62/1978» - paragraphes 24-25 ci-dessous). Elle se plaignait notamment d'une ingérence illégitime dans son domicile et dans la jouissance pacifique de celui-ci, d'une violation de son droit de choisir librement un domicile et d'atteintes à son intégrité physique et morale, sa liberté et sa sécurité (articles 15, 17 par. 1, 18 par. 2 et 19 de la Constitution - paragraphe 23 ci-dessous), en raison de l'attitude passive de la municipalité face aux nuisances et risques causés par la station d'épuration. Elle demandait à la cour d'ordonner l'arrêt temporaire ou définitif de ses activités.

11. La cour recueillit plusieurs témoignages proposés par la requérante et chargea l'Agence régionale pour l'environnement et la nature de formuler un avis sur les conditions de fonctionnement et la situation de la station. Dans un rapport du 19 janvier 1989, l'agence constata que, lors de la visite de l'expert le 17 janvier, celle-ci avait pour seule activité l'épuration des eaux résiduelles souillées au chrome, mais que le reste des résidus passait aussi par la station à travers des bassins avant d'être rejetés dans la rivière, ce qui provoquait des mauvaises odeurs. Elle concluait donc que l'emplacement de la station n'était pas le plus adéquat.

Le ministère public se montra favorable aux prétentions de l'intéressée. Cependant, l'Audiencia Territorial la

débouta le 31 janvier 1989. Selon elle, bien que le fonctionnement de la station pût indéniablement causer des nuisances dues aux odeurs, fumées et bruits, il ne constituait pas un danger grave pour la santé des familles habitant dans les environs, mais plutôt une détérioration de leur qualité de vie, qui n'était pas suffisamment importante pour porter atteinte aux droits fondamentaux revendiqués. En tout cas, on ne pouvait pas l'imputer à la ville, qui avait pris des mesures à cet égard; quant à l'absence de permis, il ne s'agissait pas d'une question à examiner dans le cadre de la procédure spéciale engagée en l'espèce puisqu'elle touchait à la violation de la légalité ordinaire.

##### 2. La procédure devant le Tribunal suprême

12. Mme **López Ostra** introduisit le 10 février 1989 un appel devant le Tribunal suprême (Tribunal Supremo - paragraphe 25 in fine ci-dessous). Selon elle, divers témoignages et expertises montraient que la station dégageait des fumées polluantes, des odeurs pestilentielles et irritantes ainsi que des bruits répétitifs ayant causé des ennuis de santé à sa fille et à elle-même. En ce qui concernait la responsabilité de la municipalité, la décision de l'Audiencia Territorial paraissait inconciliable avec les pouvoirs généraux de police que le règlement de 1961 attribue aux maires, spécialement quand l'activité en question s'exerce sans permis (paragraphe 28 ci-dessous). Compte tenu, entre autres, de l'article 8 par. 1 (art. 8-1) de la Convention, l'attitude de la ville constituait une ingérence illégitime dans son droit au respect du domicile, et en outre une atteinte à son intégrité physique. Enfin, l'intéressée réclamait la suspension des activités de la station.

13. Le 23 février 1989, le procureur près le Tribunal suprême formula ses conclusions: la situation incriminée constituait une ingérence arbitraire et illégale des autorités publiques dans la vie privée et familiale de la requérante (article 18 combiné avec les articles 15 et 19 de la Constitution - paragraphe 23 ci-dessous); il y avait donc lieu de faire droit à sa demande en vue des nuisances qu'elle subissait et de la détérioration de sa qualité de vie, reconnues d'ailleurs par l'arrêt du 31 janvier. Le 13 mars, le procureur appuya la demande de suspension (paragraphe 12 ci-dessus et 25 ci-dessous).

14. Par un arrêt du 27 juillet 1989, le Tribunal suprême rejeta l'appel. La décision attaquée était conforme aux dispositions constitutionnelles invoquées car aucun agent public n'avait pénétré dans le domicile de l'intéressée, qui d'ailleurs était libre de déménager, ni porté atteinte à son intégrité physique. Quant à l'absence de permis, elle devait s'examiner dans le cadre d'une procédure ordinaire.

##### 3. La procédure devant le Tribunal constitutionnel

15. Le 20 octobre 1989, Mme **López Ostra** saisit le Tribunal constitutionnel d'un recours d'amparo alléguant

une violation des articles 15 (droit à l'intégrité physique), 18 (droit à la vie privée et à l'inviolabilité du domicile familial) et 19 (droit de choisir librement son domicile) de la Constitution (paragraphe 23 ci-dessous).

Le 26 février 1990, la haute juridiction déclara le recours irrecevable pour défaut manifeste de fondement. Elle notait que le grief tiré d'une violation du droit au respect de la vie privée, n'avait pas été dûment soulevé devant les tribunaux ordinaires. Pour le reste, elle estimait que l'existence de fumées, odeurs et bruits ne constituait pas en soi une violation du droit à l'inviolabilité du domicile, que le refus d'ordonner la fermeture de la station ne pouvait passer pour un traitement dégradant car la vie et l'intégrité physique de la requérante ne se trouvaient pas en danger, et qu'il n'y avait pas eu atteinte à son droit de choisir un domicile car aucune autorité ne l'avait chassée de sa maison.

### C. Les autres procédures concernant la station d'épuration de Lorca

#### 1. La procédure relative à l'absence de permis

16. Deux belles-soeurs de Mme **López** Ostra, habitant le même immeuble, introduisirent en 1990 devant le Tribunal supérieur (Tribunal Superior de Justicia) (chambre administrative) de Murcie, un recours contre la ville de Lorca et SACURSA, alléguant le fonctionnement illégal de la station. Le 18 septembre 1991, cette juridiction, constatant la persistance des nuisances après le 9 septembre 1988 et l'absence des permis exigés par la loi, ordonna la fermeture provisoire de la station jusqu'à ce que ceux-ci fussent obtenus (paragraphe 28 ci-dessous). Cependant, l'exécution de cet arrêt demeura suspendue à la suite de l'appel de la ville et de SACURSA. L'affaire est encore pendante devant le Tribunal suprême.

#### 2. La plainte pour délit écologique

17. Le 13 novembre 1991, les deux belles-soeurs de la requérante déposèrent plainte, à la suite de quoi le juge d'instruction n° 2 de Lorca entama des poursuites pénales contre SACURSA pour délit écologique (article 347 bis du code pénal - paragraphe 29 ci-dessous). Les deux plaignantes se constituèrent partie civile.

Dès le 15 novembre, le juge décida la fermeture de la station, mais la mesure fut suspendue le 25, en raison du recours présenté par le ministère public le 19 novembre.

18. Le juge ordonna plusieurs expertises sur la gravité des nuisances provoquées par la station d'épuration et sur ses conséquences pour la santé des riverains.

Un premier rapport, daté du 13 octobre 1992 et rédigé par un docteur en sciences chimiques de l'Université de Murcie, conclut à la présence sur les lieux de sulfure d'hydrogène (gaz incolore, soluble dans l'eau, à odeur

caractéristique d'oeuf pourri) à des niveaux supérieurs à ceux autorisés. Le déversement d'eaux contenant du sulfure dans un fleuve était jugé inacceptable. Un rapport complémentaire du 25 janvier 1993 confirma ces conclusions.

Un rapport de l'Institut national de toxicologie, du 27 octobre 1992, estima que ce gaz avait des niveaux probablement supérieurs au maximum permis, mais ne constituait pas un risque pour la santé des personnes habitant à proximité. Dans un second rapport, du 10 février 1993, l'Institut signala qu'on ne pouvait exclure que l'occupation des logements proches pendant vingt-quatre heures constituât un danger pour la santé, car les calculs portaient seulement sur une durée de huit heures par jour pendant cinq jours.

Enfin l'Agence régionale pour l'environnement et la nature, chargée par la municipalité de Lorca d'effectuer une expertise, conclut dans son rapport du 29 mars 1993 que le niveau de bruit produit par la station en fonctionnement n'était pas supérieur à celui mesuré dans d'autres quartiers de la ville.

19. Quant aux conséquences sur la santé des riverains, le dossier d'instruction contient plusieurs certificats et expertises médico-légales. Dans un certificat du 12 décembre 1991, le docteur de Ayala Sánchez, pédiatre, note que la fille de Mme **López** Ostra, Cristina, présente un tableau clinique de nausées, vomissements, réactions allergiques, anorexies, etc., qui ne trouvent d'explication que dans le fait de vivre dans une zone hautement polluée. Il recommande l'éloignement de la fillette du site.

De son côté, le rapport d'expertise de l'Institut médico-légal de Cartagène du ministère de la Justice, du 16 avril 1993, relève que le niveau d'émission de gaz dans les maisons proches de la station dépasse le seuil autorisé. Il constate que la fille de la requérante et son neveu, Fernando **López** Gómez, présentent un état typique d'imprégnation chronique du gaz en question, avec des poussées qui se manifestent sous la forme d'infections broncho-pulmonaires aiguës. Il estime qu'il existe une relation de cause à effet entre ce tableau clinique et le niveau de concentration de gaz.

20. En outre, il ressort des témoignages de trois policiers, appelés à proximité de la station par une belle-soeur de l'intéressée le 9 janvier 1992, que les odeurs se dégageant de ladite station à leur arrivée étaient très fortes et provoquaient des nausées.

21. A partir du 1er février 1992, Mme **López** Ostra et sa famille furent relogées dans un appartement situé au centre de Lorca, dont le loyer était pris en charge par la municipalité.

En raison des inconvénients liés au changement de domicile et à la précarité de leur logement, la requérante

et son mari achetèrent une maison dans un autre quartier de la ville le 23 février 1993.

22. Le 27 octobre 1993, le juge confirma l'ordonnance du 15 novembre 1991 et la station fut fermée provisoirement.

## II. Le droit interne pertinent

### A. La Constitution

23. Les articles pertinents de la Constitution prévoient:

#### Article 15

«Toute personne a droit à la vie et à l'intégrité physique et morale, sans qu'en aucun cas elle puisse être soumise à la torture ni à des peines ou à des traitements inhumains ou dégradants. La peine de mort est abolie, exception faite des dispositions que pourront prévoir les lois pénales militaires en temps de guerre.»

#### Article 17 par. 1

«Toute personne a droit à la liberté et à la sécurité. (...)»

#### Article 18

1. Le droit à l'honneur, à la vie privée et familiale et à sa propre image est garanti.
2. Le domicile est inviolable. Aucune irruption ou perquisition ne sera autorisée sans le consentement de celui qui y habite ou sans décision judiciaire, hormis en cas de flagrant délit. (...)»

#### Article 19

«Les Espagnols ont le droit de choisir librement leur résidence et de circuler sur le territoire national (...)»

#### Article 45

1. Toute personne a le droit de jouir d'un environnement approprié pour développer sa personnalité et elle a le devoir de le conserver.
2. Les pouvoirs publics veilleront à l'utilisation rationnelle de toutes les ressources naturelles, afin de protéger et améliorer la qualité de la vie et de défendre et restaurer l'environnement, en ayant recours à l'indispensable solidarité collective.
3. Ceux qui violeront les dispositions du paragraphe précédent encourront, dans les termes fixés par la loi, des sanctions pénales ou, s'il y a lieu, des sanctions administratives et ils seront tenus de réparer les dommages causés.»

### B. La loi de 1978 sur la protection des droits fondamentaux

24. La loi 62/1978 prévoit la protection de certains droits fondamentaux par les juridictions ordinaires. Parmi les droits garantis de cette façon se trouve l'inviolabilité du domicile et la liberté de résidence (article 1 par. 2). Cependant, la disposition transitoire 2 par. 2 de la loi sur le Tribunal constitutionnel du 3 octobre 1979 étend son application aux autres droits reconnus par les articles 14 à 29 de la Constitution (article 53 de la Constitution).

25. Contre les actes de l'administration qui touchent aux droits de l'individu, l'intéressé peut saisir la chambre administrative de la juridiction ordinaire compétente (article 6), sans devoir épuiser auparavant les voies administratives (article 7 par. 1). La procédure suivie a un caractère urgent se traduisant par des délais plus courts et la dispense de certains actes de procédure (articles 8 et 10).

Dans la requête introductive, l'individu peut demander la suspension de l'acte attaqué, qui est décidée selon une procédure sommaire distincte (article 7).

L'arrêt de ladite juridiction peut faire l'objet d'un appel devant le Tribunal suprême (article 9), qui l'examine de façon accélérée.

### C. Les règles relatives à la protection de l'environnement

26. La protection de l'environnement fait l'objet de nombreuses dispositions de l'Etat et des communautés autonomes, de différents rangs normatifs: l'article 45 la Constitution (paragraphe 23 ci-dessus); la loi 20/1986 du 14 mai 1986 sur les déchets toxiques et dangereux; le décret législatif royal 1302/1986 du 28 juin 1986 sur l'évaluation de l'impact sur l'environnement; la loi 38/1972 du 22 décembre 1972 sur la protection du milieu atmosphérique.

27. En l'espèce, le texte le plus souvent invoqué est le règlement de 1961 relatif aux activités classées gênantes, insalubres, nocives et dangereuses, approuvé par le décret 2414/1961 du 30 novembre.

Ce dernier vise à éviter que les installations, établissements, activités, industries ou magasins, qu'ils soient publics ou privés, causent des nuisances, altèrent les conditions normales de salubrité et d'hygiène de l'environnement et entraînent des dommages à la richesse publique ou privé ou impliquent des risques graves pour les personnes ou pour les biens (article 1). L'article 3 étend l'application du règlement aux bruits, vibrations, fumées, gaz, odeurs, etc.

En ce qui concerne leur implantation, les activités dont il s'agit obéissent aux ordonnances municipales et plans d'aménagement des sols. En tout cas, les usines considérées

comme dangereuses ou insalubres ne peuvent s'installer en principe à moins de 2 000 mètres de la zone d'habitation la plus proche (article 4).

28. Le maire a compétence pour accorder les permis relatifs à l'exercice des activités en question, ainsi que pour contrôler l'application des dispositions précitées et le cas échéant infliger des sanctions (article 6 du règlement).

La procédure pour obtenir lesdits permis comporte plusieurs étapes, y compris la consultation obligatoire d'une commission provinciale sur l'adéquation des systèmes correcteurs proposés par le demandeur dans son descriptif du projet. Avant la mise en marche de l'établissement, un technicien de la commune doit impérativement contrôler les installations (articles 29-34).

Contre les décisions d'octroi ou de refus de permis, les intéressés peuvent introduire un recours devant les juridictions ordinaires (article 42).

Lorsque des nuisances se produisent, le maire peut enjoindre au responsable de celles-ci de prendre des mesures pour les faire disparaître. Faute de leur adoption dans les délais légaux, le maire, au vu des expertises pratiquées et après audition de l'intéressé, peut soit infliger une amende, soit retirer de manière temporaire ou définitive le permis (article 38).

#### D. *Le code pénal*

29. L'article 347 bis fut introduit le 25 juin 1983 par la loi de réforme urgente et partielle du code pénal (8/1983). Il prévoit:

«Est passible d'une peine d'emprisonnement d'un à six mois (*arresto mayor*) et d'une amende de 50.000 à 1.000.000 pesetas, quiconque, enfreignant les lois ou règlements protecteurs de l'environnement, provoque ou pratique, directement ou indirectement, des émissions ou déversements de tout genre dans l'atmosphère, le sol ou les eaux (...), susceptibles de mettre en danger grave la santé des personnes, ou de nuire gravement aux conditions de vie animale, aux forêts, espaces naturels ou plantations utiles.

La peine supérieure (emprisonnement de six mois à six ans) sera prononcée si l'établissement industriel fonctionne clandestinement, sans avoir obtenu les autorisations administratives nécessaires, ou en contravention avec les décisions expresses de l'administration ordonnant de modifier ou de cesser l'activité polluante, ou s'il a donné des informations mensongères quant à son incidence sur l'environnement ou qu'il a fait obstacle aux activités d'inspection de l'administration.

(...)

Dans tous les cas prévus dans le présent article, la fermeture provisoire ou définitive de l'installation pourra être décidée (...)

#### PROCEDURE DEVANT LA COMMISSION

30. Mme López Ostra a saisi la Commission le 14 mai 1990. Elle se plaignait de l'inaction de la municipalité de Lorca face aux nuisances causées par une station d'épuration installée à quelques mètres de sa maison; invoquant les articles 8 par. 1 et 3 (art. 8-1, art. 3) de la Convention, elle s'estimait victime d'une violation du droit au respect de son domicile rendant impossible sa vie privée et familiale, ainsi que d'un traitement dégradant.

31. La Commission a retenu la requête (n° 16798/90) le 8 juillet 1992. Dans son rapport du 31 août 1993 (article 31) (art. 31), elle conclut, à l'unanimité, qu'il y a eu violation de l'article 8 (art. 8), mais non de l'article 3 (art. 3). Le texte intégral de son avis figure en annexe au présent arrêt\*.

#### CONCLUSIONS PRESENTÉES A LA COUR

32. Le Gouvernement a invité la Cour à accueillir ses exceptions préliminaires ou, à défaut, à constater «l'absence de manquement (...) du Royaume d'Espagne aux obligations découlant de la Convention».

33. A l'audience, le conseil de la requérante a prié la Cour «de déclarer que, dans l'affaire López Ostra, l'Etat espagnol n'a pas respecté les obligations que lui imposent les articles 8 et 3 (art. 8, art. 3) de la Convention».

#### EN DROIT

34. La requérante allègue la violation des articles 8 et 3 (art. 8, art. 3) de la Convention, en raison des odeurs, bruits et fumées polluantes provoqués par une station d'épuration d'eaux et de déchets installée à quelques mètres de son domicile. Elle en impute la responsabilité aux autorités espagnoles, qui auraient fait preuve de passivité.

#### I. SUR LES EXCEPTIONS PRELIMINAIRES DU GOUVERNEMENT

A. *Sur l'exception tirée du non-épuisement des voies de recours internes*

35. Le Gouvernement soutient, comme déjà devant la Commission, que Mme López Ostra n'a pas épuisé les voies de recours internes. Le recours spécial en protection des droits fondamentaux choisi par elle (paragraphe 10-

\* Note du greffier: pour des raisons d'ordre pratique il n'y figurera que dans l'édition imprimée (volume 303-C de la série A des publications de la Cour), mais chacun peut s'en procurer copie auprès du greffe.

15 et 24-25 ci-dessus) ne serait pas le moyen adéquat pour soulever des questions de légalité ordinaire et des controverses d'ordre scientifique sur les effets d'une station d'épuration. En effet, il s'agirait d'une procédure abrégée et rapide pour donner une solution à des violations manifestes de droits fondamentaux, et l'administration de preuves s'y trouverait réduite.

En revanche, l'intéressée aurait dû emprunter tant la voie pénale que la voie administrative ordinaire qui avaient démontré leur efficacité dans des circonstances similaires. Ainsi, pour les mêmes faits, ses belles-soeurs ont engagé une procédure ordinaire en avril 1990, puis déposé une plainte pénale le 13 novembre 1991. Les juridictions compétentes ont ordonné la fermeture de la station dès les 18 septembre et 15 novembre 1991 respectivement, mais l'exécution de ces décisions a été suspendue en raison des appels de la ville et du ministère public (paragraphe 16 et 17 ci-dessus). Le 27 octobre 1993, la station a été fermée sur ordonnance du juge pénal, mais les deux procédures sont toujours pendantes devant les tribunaux espagnols. Si la Cour se prononçait dans cette affaire, comme le fait la Commission dans son rapport, sur la base des documents produits par les parties et concernant lesdites procédures, sa décision préjugerait du résultat de celles-ci.

36. La Cour estime au contraire, avec la Commission et la requérante, que le recours spécial en protection des droits fondamentaux dont cette dernière a saisi l'Audiencia Territorial de Murcia (paragraphe 10 ci-dessus) constituait un moyen efficace et rapide de redresser les griefs relatifs aux droits au respect de son domicile et de son intégrité physique. D'autant plus que ledit recours aurait pu produire l'effet voulu par la requérante, c'est-à-dire la fermeture de la station d'épuration. Le ministère public avait d'ailleurs conclu, devant les deux juridictions qui connurent de l'affaire au fond (l'Audiencia Territorial de Murcia et le Tribunal suprême - paragraphes 11 et 13 ci-dessus), qu'il fallait accueillir le recours de l'intéressée.

37. Au sujet de la nécessité d'attendre le dénouement des deux procédures engagées par les belles-soeurs de Mme López Ostra devant les juridictions ordinaires (administrative et pénale), la Cour constate avec la Commission que la requérante n'est pas partie auxdites instances. Au demeurant l'objet de celles-ci ne coïncide pas complètement avec celui du recours en protection des droits fondamentaux, et donc de la requête à Strasbourg, même si elles pourraient aboutir au résultat voulu. En effet, la procédure administrative ordinaire concerne, notamment, une autre question, celle de l'absence d'autorisation municipale pour l'installation et le fonctionnement de la station. De même, le problème de l'éventuelle responsabilité pénale de SACURSA pour un possible délit écologique diffère de celui de l'inactivité de la ville, ou d'autres autorités nationales compétentes, en ce qui concerne les nuisances causées par la station litigieuse.

38. Reste à savoir, enfin, si l'intéressée devait entamer elle-même l'une ou l'autre des deux procédures en question pour épuiser les voies de recours internes. La Cour marque ici à nouveau son accord avec la Commission. La requérante ayant fait usage d'un recours efficace et pertinent par rapport à la violation dont elle se plaint, elle n'était pas obligée d'en intenter également d'autres, moins rapides.

Elle a donc laissé aux juridictions de son pays l'occasion que l'article 26 (art. 26) de la Convention a pour finalité de ménager en principe aux Etats contractants: redresser les manquements allégués à leur encontre (voir, entre autres, les arrêts De Wilde, Ooms et Versyp c. Belgique du 18 juin 1971, série A n° 12, p. 29, par. 50, et Guzzardi c. Italie du 6 novembre 1980, série A n° 39, p. 27, par. 72).

39. Il échet donc de rejeter l'exception.

#### *B. Sur l'exception tirée du défaut de la qualité de victime*

40. Le Gouvernement soulève une seconde exception déjà présentée à la Commission. Il admet que Mme López Ostra, comme d'ailleurs les autres habitants de Lorca, a subi de graves nuisances provoquées par la station jusqu'au 9 septembre 1988, date de l'arrêt partiel des activités de cette dernière (paragraphe 9 ci-dessus). Cependant, à supposer même que des odeurs ou des bruits - non excessifs - aient pu continuer après cette date, l'intéressée aurait perdu entre-temps la qualité de victime: depuis février 1992, la famille López Ostra a été relogée dans un appartement au centre ville aux frais de la municipalité, puis, en février 1993, elle a emménagé dans une maison achetée par la famille (paragraphe 21 ci-dessus). En tout cas, la fermeture de la station en octobre 1993 aurait mis fin à toute nuisance, de sorte que désormais ni la requérante ni ses proches ne subiraient les prétendus effets indésirables du fonctionnement de ladite station.

41. A l'audience, le délégué de la Commission a fait remarquer que la décision du juge d'instruction du 27 octobre 1993 (paragraphe 22 ci-dessus) ne dépouille pas de la qualité de victime une personne que les conditions de l'environnement ont forcée à abandonner son domicile, puis à acheter une autre maison.

42. La Cour partage cette opinion. Ni le déménagement de Mme López Ostra ni la fermeture - encore provisoire (paragraphe 22 ci-dessus) - de la station d'épuration n'effacent le fait que l'intéressée et les membres de sa famille ont vécu des années durant à douze mètres d'un foyer d'odeurs, bruits et fumées.

Quoi qu'il en soit, si la requérante pouvait maintenant regagner son ancien logement après la décision de clôture, ce serait un élément à retenir pour le calcul du préjudice subi par elle, mais ne lui ôterait pas la qualité de victime

(voir, parmi beaucoup d'autres, les arrêts *Marckx c. Belgique* du 13 juin 1979, série A n° 31, pp. 13-14, par. 27, et *Inze c. Autriche* du 28 octobre 1987, série A n° 126, p. 16, par. 32).

43. L'exception se révèle donc non fondée.

## II. SUR LA VIOLATION ALLEGUEE DE L'ARTICLE 8 (ART. 8) DE LA CONVENTION

44. Mme **López Ostra** allègue en premier lieu une violation de l'article 8 (art. 8) de la Convention, ainsi rédigé:

- «1. Toute personne a droit au respect de sa vie privée et familiale, de son domicile et de sa correspondance.
2. Il ne peut y avoir ingérence d'une autorité publique dans l'exercice de ce droit que pour autant que cette ingérence est prévue par la loi et qu'elle constitue une mesure qui, dans une société démocratique, est nécessaire à la sécurité nationale, à la sûreté publique, au bien-être économique du pays, à la défense de l'ordre et à la prévention des infractions pénales, à la protection de la santé ou de la morale, ou à la protection des droits et libertés d'autrui.»

La Commission partage cette opinion, que le Gouvernement combat.

45. Le Gouvernement fait remarquer que le grief soulevé devant la Commission et retenu par elle (paragraphe 30 et 31 ci-dessus) ne coïncide pas avec celui que les juridictions espagnoles examinèrent dans le cadre du recours en protection des droits fondamentaux, car il se fonderait sur des affirmations, rapports médicaux et expertises techniques postérieurs audit recours et totalement étrangers à ce dernier.

46. Pareil argument n'emporte pas la conviction de la Cour. La requérante critiquait une situation qui s'était prolongée en raison de l'inaction de la municipalité et des autres autorités compétentes. Ladite inaction constituait un des éléments essentiels des griefs présentés à la Commission tout comme du recours devant l'Audiencia Territorial de Murcie (paragraphe 10 ci-dessus). Qu'elle ait persisté après la saisine de la Commission et sa décision sur la recevabilité, ne saurait être retenu contre l'intéressée. La Cour peut tenir compte de faits postérieurs à l'introduction de la requête - et même à l'adoption de la décision sur la recevabilité - lorsqu'il s'agit d'une situation appelée à perdurer (voir, en premier lieu, l'arrêt *Neumeister c. Autriche* du 27 juin 1968, série A n° 8, p. 21, par. 28, et p. 38, par. 7).

47. Mme **López Ostra** prétend qu'en dépit de l'arrêt partiel des activités de la station le 9 septembre 1988, celle-ci a continué à dégager des fumées, des bruits répétitifs et

de fortes odeurs, qui ont rendu insupportable le cadre de vie de sa famille et provoqué chez elle-même et ses proches de sérieux problèmes de santé. Elle allègue à cet égard une violation de son droit au respect de son domicile.

48. Le Gouvernement conteste la réalité et la gravité de la situation décrite (paragraphe 40 ci-dessus).

49. S'appuyant sur des rapports médicaux et d'expertise fournis tantôt par le Gouvernement tantôt par la requérante (paragraphe 18-19 ci-dessus), la Commission a constaté, notamment, que les émanations de sulfure d'hydrogène provenant de la station dépassaient le seuil autorisé, qu'elles pouvaient entraîner un danger pour la santé des habitants des logements proches et, enfin, qu'il pouvait y avoir un lien de causalité entre lesdites émanations et les affections dont souffrait la fille de la requérante.

50. Selon la Cour, ces constats ne font que confirmer le premier rapport d'expertise soumis le 19 janvier 1989 à l'Audiencia Territorial par l'Agence régionale pour l'environnement et la nature, dans le cadre du recours en protection des droits fondamentaux intenté par Mme **López Ostra**. Le ministère public soutint ledit recours tant en première qu'en seconde instance (paragraphe 11 et 13 ci-dessus). L'Audiencia Territorial elle-même admit que les nuisances litigieuses, sans constituer un danger grave pour la santé, causaient une détérioration de la qualité de vie des riverains, détérioration qui cependant ne se révélait pas suffisamment sérieuse pour enfreindre les droits fondamentaux reconnus dans la Constitution (paragraphe 11 ci-dessus).

51. Il va pourtant de soi que des atteintes graves à l'environnement peuvent affecter le bien-être d'une personne et la priver de la jouissance de son domicile de manière à nuire à sa vie privée et familiale, sans pour autant mettre en grave danger la santé de l'intéressée.

Que l'on aborde la question sous l'angle d'une obligation positive de l'Etat - adopter des mesures raisonnables et adéquates pour protéger les droits de l'individu en vertu du paragraphe 1 de l'article 8 (art. 8-1) -, comme le souhaite dans son cas la requérante, ou sous celui d'une «ingérence d'une autorité publique», à justifier selon le paragraphe 2 (art. 8-2), les principes applicables sont assez voisins. Dans les deux cas, il faut avoir égard au juste équilibre à ménager entre les intérêts concurrents de l'individu et de la société dans son ensemble, l'Etat jouissant en toute hypothèse d'une certaine marge d'appréciation. En outre, même pour les obligations positives résultant du paragraphe 1 (art. 8-1), les objectifs énumérés au paragraphe 2 (art. 8-2) peuvent jouer un certain rôle dans la recherche de l'équilibre voulu (voir, notamment, les arrêts *Rees c. Royaume-Uni* du 17 octobre 1986, série A n° 106, p. 15, par. 37, et *Powell et Rayner c. Royaume-Uni* du 21 février 1990, série A n° 172, p. 18, par. 41).

52. Il ressort du dossier que la station d'épuration litigieuse fut construite en juillet 1988 par SACURSA pour

résoudre un grave problème de pollution existant à Lorca à cause de la concentration de tanneries. Or, dès son entrée en service, elle provoqua des nuisances et troubles de santé chez de nombreux habitants (paragraphe 7 et 8 ci-dessus).

Certes, les autorités espagnoles, et notamment la municipalité de Lorca, n'étaient pas en principe directement responsables des émanations dont il s'agit. Toutefois, comme le signale la Commission, la ville permit l'installation de la station sur des terrains lui appartenant et l'Etat octroya une subvention pour sa construction (paragraphe 7 ci-dessus).

53. Le conseil municipal réagit avec célérité en relogant gratuitement au centre ville pendant les mois de juillet, août et septembre 1988 les résidents affectés, puis en closant l'une des activités de la station à partir du 9 septembre (paragraphe 8 et 9 ci-dessus). Cependant, ses membres ne pouvaient ignorer que les problèmes d'environnement persistent après cette clôture partielle (paragraphe 9 et 11 ci-dessus). Cela fut d'ailleurs corroboré dès le 19 janvier 1989 par le rapport de l'Agence régionale pour l'environnement et la nature, puis confirmé par des expertises en 1991, 1992 et 1993 (paragraphe 11 et 18 ci-dessus).

54. D'après Mme López Ostra, les pouvoirs généraux de police, attribués à la municipalité par le règlement de 1961, obligeaient ladite municipalité à agir. En outre, la station ne réunissait pas les conditions requises par la loi, notamment en ce qui concernait son emplacement et l'absence de permis municipal (paragraphe 8, 27 et 28 ci-dessus).

55. Sur ce point, la Cour rappelle que la question de la légalité de l'installation et du fonctionnement de la station demeure pendante devant le Tribunal suprême depuis 1991 (paragraphe 16 ci-dessus). Or, d'après sa jurisprudence constante, il incombe au premier chef aux autorités nationales, et spécialement aux cours et tribunaux, d'interpréter et d'appliquer le droit interne (voir, entre autres, l'arrêt Casado Coca c. Espagne du 24 février 1994, série A n° 285-A, p. 18, par. 43).

De toute manière, la Cour estime qu'en l'occurrence il lui suffit de rechercher si, à supposer même que la municipalité se soit acquittée des tâches qui lui revenaient d'après le droit interne (paragraphe 27-28 ci-dessus), les autorités nationales ont pris les mesures nécessaires pour protéger le droit de la requérante au respect de son domicile ainsi que de sa vie privée et familiale garanti par l'article 8 (art. 8) (voir entre autres, *mutatis mutandis*, l'arrêt X et Y c. Pays-Bas du 26 mars 1985, série A n° 91, p. 11, par. 23).

56. Il échet de constater que non seulement la municipalité n'a pas pris après le 9 septembre 1988 des mesures à cette fin, mais aussi qu'elle a contrecarré des décisions judiciaires allant dans ce sens. Ainsi, dans la

procédure ordinaire entamée par les belles-soeurs de Mme López Ostra, elle a interjeté appel contre la décision du Tribunal supérieur de Murcie du 18 septembre 1991 ordonnant la fermeture provisoire de la station, de sorte que cette mesure resta en suspens (paragraphe 16 ci-dessus).

D'autres organes de l'Etat ont aussi contribué à prolonger la situation. Ainsi, le ministère public attaqua, le 19 novembre 1991, la décision de fermeture provisoire prise par le juge d'instruction de Lorca le 15 dans le cadre des poursuites pour délit écologique (paragraphe 17 ci-dessus), si bien que la mesure est restée inexécutée jusqu'au 27 octobre 1993 (paragraphe 22 ci-dessus).

57. Le Gouvernement rappelle que la ville a assumé les frais de location d'un appartement au centre de Lorca, que la requérante et sa famille ont occupé du 1er février 1992 jusqu'en février 1993 (paragraphe 21 ci-dessus).

La Cour note cependant que les intéressés ont dû subir pendant plus de trois ans les nuisances causées par la station, avant de déménager avec les inconvénients que cela comporte. Ils ne l'ont fait que lorsqu'il apparut que la situation pouvait se prolonger indéfiniment et sur prescription du pédiatre de la fille de Mme López Ostra (paragraphe 16, 17 et 19 ci-dessus). Dans ces conditions, l'offre de la municipalité ne pouvait pas effacer complètement les nuisances et inconvénients vécus.

58. Compte tenu de ce qui précède - et malgré la marge d'appréciation reconnue à l'Etat défendeur -, la Cour estime que celui-ci n'a pas su ménager un juste équilibre entre l'intérêt du bien-être économique de la ville de Lorca - celui de disposer d'une station d'épuration - et la jouissance effective par la requérante du droit au respect de son domicile et de sa vie privée et familiale.

Il y a donc eu violation de l'article 8 (art. 8) .

### III. SUR LA VIOLATION ALLEGUEE DE L'ARTICLE 3 (ART. 3) DE LA CONVENTION

59. Selon Mme López Ostra, les faits reprochés à l'Etat défendeur revêtent une telle gravité et ont suscité chez elle une telle angoisse qu'ils peuvent raisonnablement passer pour des traitements dégradants prohibés par l'article 3 (art. 3) de la Convention, ainsi libellé:

«Nul ne peut être soumis à la torture ni à des peines ou traitements inhumains ou dégradants.»

Gouvernement et Commission considèrent qu'il n'y a pas eu violation de cette disposition.

60. Tel est aussi l'avis de la Cour. Les conditions dans lesquelles la requérante et sa famille vécurent pendant



quelques années furent certainement très difficiles, mais elles ne constituent pas un traitement dégradant au sens de l'article 3 (art. 3).

#### IV. SUR L'APPLICATION DE L'ARTICLE 50 (ART. 50) DE LA CONVENTION

61. Aux termes de l'article 50 (art. 50),

«Si la décision de la Cour déclare qu'une décision prise ou une mesure ordonnée par une autorité judiciaire ou toute autre autorité d'une Partie Contractante se trouve entièrement ou partiellement en opposition avec des obligations découlant de la (...) Convention, et si le droit interne de ladite Partie ne permet qu'imparfaitement d'effacer les conséquences de cette décision ou de cette mesure, la décision de la Cour accorde, s'il y a lieu, à la partie lésée une satisfaction équitable.»

Mme López Ostra réclame une indemnité pour dommage et le remboursement de frais et dépens.

##### A. *Dommage*

62. La requérante affirme que l'installation et le fonctionnement d'une station d'épuration de déchets à côté de son logement l'ont obligée à modifier radicalement son mode de vie. Elle demande en conséquence les sommes suivantes en réparation du dommage subi:

- a) 12 180 000 pesetas pour l'angoisse éprouvée du 1er octobre 1988 au 31 janvier 1992, lorsqu'elle habitait dans son ancien foyer;
- b) 3 000 000 pesetas pour l'anxiété causée par la grave maladie de sa fille;
- c) 2 535 000 pesetas pour les inconvénients provoqués par son déménagement, non désiré, à partir du 1er février 1992;
- d) 7 000 000 pesetas pour le coût de la nouvelle maison qu'elle a été obligée d'acheter en février 1993 en raison de la précarité du logement offert par la municipalité de Lorca;
- e) 295 000 pesetas pour les frais d'installation dans ladite maison.

63. Le Gouvernement trouve ces demandes exagérées. Il fait remarquer que la ville de Lorca a payé le loyer de l'appartement que Mme López Ostra a occupé avec sa famille au centre ville depuis le 1er février 1992 jusqu'à son emménagement dans son nouveau logement.

64. Quant au délégué de la Commission, il estime excessive la somme globale sollicitée. En ce qui concerne le préjudice matériel, il considère que si l'intéressée pouvait en principe réclamer une nouvelle maison, elle devait en échange donner son ancien foyer, toute proportion gardée.

65. La Cour admet que Mme López Ostra a subi un certain dommage en raison de la violation de l'article 8 (art. 8) (paragraphe 58 ci-dessus): la valeur de l'ancien appartement a dû diminuer et l'obligation de déménager a dû entraîner des frais et inconvénients. En revanche, il n'y a pas de raison de lui octroyer le coût de sa nouvelle maison, puisqu'elle conserve son ancien logement. Il faut aussi tenir compte du fait que la municipalité a payé pendant un an le loyer de l'appartement occupé par la requérante et sa famille au centre de Lorca et que la station d'épuration a été fermée provisoirement par le juge d'instruction le 27 octobre 1993 (paragraphe 22 ci-dessus).

D'autre part, l'intéressée a éprouvé un tort moral indéniable; outre les nuisances provoquées par les émanations de gaz, les bruits et les odeurs provenant de l'usine, elle a ressenti de l'angoisse et de l'anxiété en voyant la situation perdurer et l'état de santé de sa fille se dégrader.

Les chefs de dommage retenus ne se prêtent pas à un calcul exact. Statuant en équité comme le veut l'article 50 (art. 50), la Cour alloue 4 000 000 pesetas à Mme López Ostra.

##### B. *Frais et dépens*

###### 1. *Devant les juridictions internes*

66. Pour les frais et dépens devant les juridictions nationales, la requérante réclame une somme totale de 850 000 pesetas.

67. Gouvernement et délégué de la Commission signalent que Mme López Ostra a bénéficié de l'assistance judiciaire gratuite en Espagne, de sorte qu'elle n'est pas tenue de rémunérer son avocat, lequel devrait recevoir de l'Etat le paiement de ses honoraires.

68. La Cour constate elle aussi que l'intéressée n'a pas supporté de frais à cet égard et rejette donc la demande dont il s'agit. Me Mazón Costa ne saurait revendiquer sur la base de l'article 50 (art. 50) une satisfaction équitable pour son propre compte car il a accepté les conditions de l'assistance judiciaire accordée à sa cliente (voir, entre autres, l'arrêt *Delta c. France* du 19 décembre 1990, série A n° 191-A, p. 18, par. 47).

###### 2. *Devant les organes de la Convention*

69. Mme López Ostra revendique 2 250 000 pesetas pour les honoraires de son avocat dans la procédure devant la Commission et la Cour, moins les sommes versées par le Conseil de l'Europe au titre de l'assistance judiciaire.

70. Gouvernement et délégué de la Commission estiment ce montant excessif.

71. A la lumière des critères se dégageant de sa jurisprudence, la Cour juge équitable d'accorder de ce chef à la requérante 1 500 000 pesetas, moins les 9 700 francs français payés par le Conseil de l'Europe.

**PAR CES MOTIFS, LA COUR, A L'UNANIMITE,**

1. Rejette les exceptions préliminaires du Gouvernement;
2. Dit qu'il y a eu violation de l'article 8 (art. 8) de la Convention;
3. Dit qu'il n'y a pas eu violation de l'article 3 (art. 3) de la Convention;
4. Dit que l'Etat défendeur doit verser à la requérante, dans les trois mois, 4 000 000 (quatre millions) pesetas pour dommage et 1 500 000 (un million cinq cent mille) pesetas, moins 9 700 (neuf mille sept cents) francs français, à convertir en pesetas au taux de

change applicable à la date du prononcé du présent arrêt, pour frais et dépens;

5. Rejette la demande de satisfaction équitable pour le surplus.

Fait en français et en anglais, puis prononcé en audience publique au Palais des Droits de l'Homme, à Strasbourg, le 9 décembre 1994.

Signé: Rolv RYSSDAL  
Président

Signé: Herbert PETZOLD  
Greffier f.f.



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**AFFAIRE GUERRA ET AUTRES c. ITALIE**

**(116/1996/735/932)**

ARRÊT

STRASBOURG

19 février 1998

Cet arrêt peut subir des retouches de forme avant la parution de sa version définitive dans le *Recueil des arrêts et décisions* 1998, édité par Carl Heymanns Verlag KG (Luxemburger Straße 449, D-50939 Cologne) qui se charge aussi de le diffuser, en collaboration, pour certains pays, avec les agents de vente dont la liste figure au verso.

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## SOMMAIRE<sup>1</sup>

### Arrêt rendu par une grande chambre

Italie – absence d’informations de la population sur les risques encourus et les mesures à prendre en cas d’accident dans une usine chimique du voisinage

#### I. ARTICLE 10 DE LA CONVENTION

##### A. Exception préliminaire du Gouvernement (non-épuisement des voies de recours internes)

Première branche – recours en référé (article 700 du code de procédure civile) : aurait été un remède exploitable si le grief des intéressées avait porté sur l’absence de mesures visant la réduction ou l’élimination de la pollution ; en l’occurrence, ce recours aurait vraisemblablement abouti à la suspension de l’activité de l’usine.

Seconde branche – recours au juge pénal : aurait pu tout au plus déboucher sur la condamnation des responsables de l’usine, mais certainement pas sur la communication d’informations aux requérantes.

*Conclusion* : rejet (dix-neuf voix contre une).

##### B. Bien-fondé du grief

Existence d’un droit pour le public de recevoir des informations : maintes fois reconnue par la Cour dans des affaires relatives à des restrictions à la liberté de la presse, comme corollaire de la fonction propre aux journalistes de diffuser des informations ou des idées sur des questions d’intérêt public – circonstances de l’espèce se distinguent nettement de celles de ces affaires car les requérantes se plaignent d’un dysfonctionnement du système instauré par la législation pertinente – préfet prépara le plan d’urgence sur la base du rapport fourni par l’usine, ce plan fut communiqué au service de la protection civile le 3 août 1993, mais à ce jour les requérantes n’ont pas reçu les informations litigieuses.

Liberté de recevoir des informations : interdit essentiellement à un gouvernement d’empêcher quelqu’un de recevoir des informations que d’autres aspirent ou peuvent consentir à lui fournir – ne saurait se comprendre comme imposant à un Etat, dans des circonstances telles que celles de l’espèce, des obligations positives de collecte et de diffusion, *motu proprio*, des informations.

*Conclusion* : inapplicabilité (dix-huit voix contre deux).

#### I. ARTICLE 8 DE LA CONVENTION

Incidence directe des émissions nocives sur le droit des requérantes au respect de leur vie privée et familiale : permet de conclure à l’applicabilité de l’article 8.

Requérantes se plaignent non d’un acte, mais de l’inaction de l’Etat – article 8 a essentiellement pour objet de prémunir l’individu contre des ingérences arbitraires des pouvoirs publics – ne se contente pas d’astreindre l’Etat à s’abstenir de pareilles ingérences : à cet engagement plutôt négatif peuvent s’ajouter des obligations positives inhérentes à un respect effectif de la vie privée ou familiale. En l’occurrence, il suffit de rechercher si les autorités nationales ont pris les mesures nécessaires pour assurer la protection effective du droit des intéressées au respect de leur vie privée et familiale.

Ministères de l’Environnement et de la Santé adoptèrent conjointement des conclusions sur le rapport de sécurité présenté par l’usine – elles donnaient au préfet des indications concernant le plan d’urgence, qu’il avait préparé en 1992, et les mesures d’information litigieuses – toutefois, au 7 décembre 1995, aucun document concernant ces conclusions n’était parvenu à la municipalité compétente.

Des atteintes graves à l’environnement peuvent toucher le bien-être des personnes et les priver de la jouissance de leur domicile de manière à nuire à leur vie privée et familiale – requérantes sont restées, jusqu’à l’arrêt de la production de fertilisants en 1994, dans l’attente d’informations essentielles qui leur auraient permis d’évaluer les risques pouvant résulter pour elles et leurs proches du fait de continuer à résider sur le territoire de Manfredonia, une commune aussi exposée au danger en cas d’accident dans l’enceinte de l’usine.

Etat défendeur a failli à son obligation de garantir le droit des requérantes au respect de leur vie privée et familiale.

*Conclusion* : applicabilité et violation (unanimité).

#### II. ARTICLE 2 DE LA CONVENTION

*Conclusion* : non nécessaire d’examiner l’affaire aussi sous l’angle de l’article 2 (unanimité).

1. Rédigé par le greffe, il ne lie pas la Cour.

### III. ARTICLE 50 DE LA CONVENTION

#### A. Préjudice

Domage matériel : non démontré.

Tort moral : octroi d'une certaine somme à chaque requérante.

#### B. Frais et dépens

Rejet de la demande – compte tenu de sa tardiveté et de l'octroi de l'assistance judiciaire.

*Conclusion* : Etat défendeur tenu de payer une certaine somme à chaque requérante (unanimité).

#### RÉFÉRENCES À LA JURISPRUDENCE DE LA COUR

9.10.1979, Airey c. Irlande ; 26.3.1987, Leander c. Suède ; 21.2.1990, Powell et Rayner c. Royaume-Uni ; 19.2.1991, Zanghi c. Italie ; 27.8.1991, Demicoli c. Malte ; 27.8.1991, Philis c. Grèce ; 26.11.1991, *Observer* et *Guardian* c. Royaume-Uni ; 25.6.1992, Thorgeir Thorgeirson c. Islande ; 9.12.1994, López Ostra c. Espagne ; 8.6.1995, Yagci et Sargin c. Turquie

#### En l'affaire Guerra et autres c. Italie<sup>2</sup>,

La Cour européenne des Droits de l'Homme, constituée, conformément à l'article 53 de son règlement B<sup>3</sup>, en une grande chambre composée des juges dont le nom suit :

MM. R. BERNHARDT, *président*,  
Thór Vilhjálmsson,  
F. Gölcüklü,  
F. Matscher,  
B. Walsh,  
R. Macdonald,  
C. Russo,  
A. Spielmann,  
M<sup>me</sup> E. PALM,  
M. A.N. LOIZOU,  
Sir John FREELAND,  
MM. M.A. LOPES ROCHA,  
G. Mifsud Bonnici,  
J. Makarczyk,  
B. Repik,  
P. Jambrek,  
P. Küris,  
E. Levits,  
J. Casadevall,  
P. van Dijk,

ainsi que de MM. H. PETZOLD, *greffier*, et P.J. MAHONEY, *greffier adjoint*,

Après en avoir délibéré en chambre du conseil les 28 août 1997 et 27 janvier 1998, Rend l'arrêt que voici, adopté à cette dernière date :

#### PROCÉDURE

1. L'affaire a été déférée à la Cour par la Commission européenne des Droits de l'Homme (« la Commission ») le 16 septembre 1996, dans le délai de trois mois qu'ouvrent les articles 32 § 1 et 47 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales (« la Convention »). A son origine se trouve une requête (n° 14967/89) dirigée contre la République italienne et dont quarante ressortissantes de cet Etat avaient saisi la Commission le 18 octobre 1988 en vertu de l'article 25. La liste des requérantes s'établit ainsi : M<sup>mes</sup> Anna Maria Guerra, Rosa Anna Lombardi, Grazia Santamaria, Addolorata Caterina Adabbo, Anna Maria Virgata, Antonetta Mancini, Michelina Berardinetti, Maria Di Lella, Maria Rosa Porcu, Anna Maria Lanzetta, Grazia Lagattolla, Apollonia Rinaldi, Renata Maria Pilati, Raffaella Ciuffreda, Raffaella Lauriola, Diana Gismondi, Filomena Totaro, Giulia De Feudis, Sipontina Santoro, Maria Lucia Rita Colavelli Tattilo, Irene Principe, Maria De Filippo, Vittoria De Salvia, Anna Totaro, Maria Telera, Grazia Telera, Nicoletta Lupoli, Lisa Schettino, Maria Rosaria Di Vico, Gioia Quitadamo, Elisa Anna Castriotta, Giuseppina Rinaldi, Giovanna Gelsomino, Antonia Iliana Titta, Concetta Trotta, Rosa Anna Giordano, Anna Maria Trufini, Angela Di Tullo, Anna Maria Giordano et Raffaella Rinaldi. La demande de la Commission renvoie aux articles 44 et 48 ainsi qu'à la déclaration italienne reconnaissant la juridiction obligatoire de la Cour (article 46). Elle a pour objet d'obtenir une décision sur le point de savoir si les faits de la cause révèlent un manquement de l'Etat défendeur aux exigences de l'article 10 de la Convention.

2. Le 4 octobre 1997, les requérantes ont désigné leur conseil (article 31 du règlement B) que le président de la chambre a autorisé à employer la langue italienne (article 28 § 3).

3. La chambre à constituer comprenait de plein droit M. C. Russo, juge élu de nationalité italienne (article 43 de la Convention), et M. R. Bernhardt, vice-président de la Cour (article 21 § 4 b) du règlement B). Le 17 septembre 1996, le président de la Cour, M. R. Ryssdal, avait tiré au sort le nom des sept autres membres, à savoir M. F. Matscher, M. A. Spielmann, Sir John Freeland, M. M.A.

2. L'affaire porte le n° 116/1996/735/932. Les deux premiers chiffres en indiquent le rang dans l'année d'introduction, les deux derniers la place sur la liste des saisines de la Cour depuis l'origine et sur celle des requêtes initiales (à la Commission) correspondantes.

3. Le règlement B, entré en vigueur le 2 octobre 1994, s'applique à toutes les affaires concernant les Etats liés par le Protocole n° 9.

Lopes Rocha, M. J. Makarczyk, M. J. Casadevall et M. P. van Dijk, en présence du greffier (articles 43 *in fine* de la Convention et 21 § 5 du règlement B).

4. En sa qualité de président de la chambre (article 21 § 6 du règlement B), M. Bernhardt a consulté, par l'intermédiaire du greffier, l'agent du gouvernement italien (« le Gouvernement »), le conseil des requérantes et le délégué de la Commission au sujet de l'organisation de la procédure (articles 39 § 1 et 40). Conformément à l'ordonnance rendue en conséquence, le greffier a reçu les mémoires des requérantes et du Gouvernement les 14 et 16 avril 1997 respectivement.

5. Le 29 avril 1997, la Commission a produit le dossier de la procédure suivie devant elle ; le greffier l'y avait invitée sur les instructions du président.

6. Ainsi qu'en avait décidé ce dernier, les débats se sont déroulés en public le 27 mai 1997, au Palais des Droits de l'Homme à Strasbourg. La Cour avait tenu auparavant une réunion préparatoire.

Ont comparu :

- *pour le Gouvernement*  
MM. G. RAIMONDI, magistrat détaché  
au service du contentieux diplomatique  
du ministère des Affaires étrangères, *coagent*,
- G. SABBEONE, magistrat détaché  
au cabinet législatif du ministère  
de la Justice, *conseil ;*
- *pour la Commission*  
M. I. CABRAL BARRETO, *délégué ;*
- *pour les requérantes*  
M<sup>lle</sup> N. SANTILLI, juriste, *conseil.*

La Cour a entendu en leurs plaidoiries M. Cabral Barreto, M<sup>lle</sup> Santilli, M. Sabbeone et M. Raimondi.

7. Le 3 juin 1997, la chambre a décidé de se dessaisir avec effet immédiat au profit d'une grande chambre (article 53 § 1 du règlement B).

8. La grande chambre à constituer comprenait de plein droit M. Ryssdal, président de la Cour, et M. Bernhardt, vice-président, les autres membres de la chambre originaire ainsi que les quatre suppléants de celle-ci, MM. P. Küris, G. Mifsud Bonnici, Thûr Vilhjímsson et B. Repik (article 53 § 2 a) et b) du règlement B). Le 3 juillet 1997, le président a tiré au sort en présence du greffier le nom des sept juges supplémentaires appelés à compléter la grande chambre, à savoir M. F. Gölcüklü, M. B. Walsh, M. R. Macdonald, M<sup>me</sup> E. Palm, M. A.N. Loizou, M. P. Jambrek et M. E. Levits (article 53 § 2 c)).

9. Le 29 juillet 1997, le président a autorisé le délégué de la Commission à présenter des observations sur les demandes de satisfaction équitable des requérantes. Lesdites observations sont parvenues au greffe le 19 septembre 1997.

10. Après avoir consulté l'agent du Gouvernement, le représentant des requérantes et le délégué de la Commission, la grande chambre avait décidé, le 28 août 1997 qu'il n'y avait pas lieu de tenir une nouvelle audience à la suite du dessaisissement de la chambre (article 40 combiné avec l'article 53 § 6).

11. M. Ryssdal se trouvant empêché de participer à la délibération du 27 janvier 1998, M. Bernhardt l'a remplacé à la présidence de la grande chambre (article 21 § 6 combiné avec l'article 53 § 6).

## EN FAIT

### I. Les circonstances de l'espèce

#### A. L'usine d'Enichem agricoltura

12. Les requérantes résident toutes dans la commune de Manfredonia (Foggia) sise à un kilomètre environ de l'usine chimique de la société anonyme Enichem agricoltura, implantée, elle, sur le territoire de la commune de Monte Sant'Angelo.

13. En 1988, l'usine, qui produisait des fertilisants et du caprolactame (composé chimique donnant par polycondensation un polyamide utilisé pour fabriquer des fibres synthétiques tel le nylon), fut classée à haut risque en application des critères retenus par le décret du président de la République du 18 mai 1988 n° 175 (« DPR 175/88 »), qui avait transposé en droit italien la directive 82/501/CEE du Conseil des Communautés européennes (directive « Seveso »), concernant les risques d'accidents majeurs liés à certaines activités industrielles dangereuses pour l'environnement et le bien-être des populations concernées.

14. Selon les requérantes, non contredites par le Gouvernement, au cours de son cycle de fabrication l'usine aurait libéré de grandes quantités de gaz inflammable – ce qui aurait pu entraîner des réactions chimiques explosives libérant des substances hautement toxiques –, ainsi que de l'anhydride sulfurique, de l'oxyde d'azote, du sodium, de l'ammoniaque, de l'hydrogène métallique, de l'acide benzoïque et surtout de l'anhydride d'arsenic.

15. Des accidents de fonctionnement s'étaient, en effet, déjà produits par le passé, le plus grave étant celui du 26 septembre 1976 lorsque l'explosion de la tour de lavage des gaz de synthèse d'ammoniaque laissa s'échapper plusieurs tonnes de solution de carbonate et de bicarbonate de potassium, contenant de l'anhydride d'arsenic. A cette occasion, 150 personnes durent être hospitalisées en raison d'une intoxication aiguë par l'arsenic.

16. Par ailleurs, dans un rapport du 8 décembre 1988, une commission technique nommée par la municipalité de Manfredonia établit notamment, qu'à cause de la position géographique de l'usine, les émissions de substances dans l'atmosphère étaient souvent canalisées vers la ville. Le rapport faisait état d'un refus de l'usine à une inspection de ladite commission et du fait que, d'après les résultats d'une étude menée par l'usine elle-même, les installations de traitement des fumées étaient insuffisantes et l'étude d'impact environnemental était incomplète.

17. En 1989, l'usine limita son activité à la production de fertilisants, ce qui justifia son maintien dans la catégorie des usines dangereuses visées par le DPR 175/88. En 1993, les ministères de l'Environnement et de la Santé adoptèrent conjointement un arrêté prescrivant des mesures à adopter par l'usine afin d'améliorer la sécurité de la production en cours de fertilisants et, en cas de reprise de la production de caprolactame, la sécurité de celle-ci (paragraphe 27 ci-dessous).

18. En 1994, l'usine arrêta définitivement la production de fertilisant. Seules une centrale thermoélectrique et des installations de traitement des eaux primaires et usées continuent de fonctionner.

#### B. Les poursuites pénales

##### 1. Devant le juge d'instance de Foggia

19. Le 13 novembre 1985, 420 habitants de Manfredonia (parmi lesquels figureraient les requérantes) saisirent le juge d'instance (*pretore*) de Foggia en dénonçant la présence dans l'atmosphère de fumées d'échappement provenant de l'usine et dont la composition chimique et le degré de toxicité n'étaient pas connus. Sept administrateurs de la société incriminée firent l'objet d'une procédure pénale pour des infractions liées à des émissions polluantes de l'usine et au non-respect de plusieurs normes concernant la protection de l'environnement.

Dans sa décision du 16 juillet 1991, le juge n'infligea aucune peine aux inculpés – soit pour cause d'amnistie ou prescription, soit pour paiement immédiat d'une amende (*oblazione*) – sauf à deux administrateurs. Ces derniers furent condamnés à cinq mois d'emprisonnement et deux millions de liras d'amende, ainsi qu'à la réparation des dommages civils, pour avoir fait construire des décharges sans avoir obtenu au préalable l'autorisation nécessaire, en violation des dispositions pertinentes du DPR 915/82 en matière d'élimination des déchets.

##### 2. Devant la cour d'appel de Bari

20. Statuant sur l'appel interjeté par les deux administrateurs condamnés ainsi que de l'organisme public pour l'électricité (*ENEL*) et de la municipalité de Manfredonia, qui s'étaient constitués parties civiles, la cour d'appel de Bari acquitta les appelants le 29 avril 1992, au

motif que le délit n'était pas constitué, confirmant pour le surplus la décision attaquée. La juridiction estima que les erreurs dans la gestion des déchets, reprochées aux intéressés devaient en fait être attribuées aux retards et incertitudes dans l'adoption et dans l'interprétation, notamment par la région des Pouilles, des normes d'application du DPR 915/82. L'existence d'un dommage indemnisable était par conséquent à exclure.

#### C. L'attitude des autorités compétentes

21. Un comité paritaire Etat-région des Pouilles fut créé auprès du ministère de l'Environnement pour donner suite à la directive Seveso.

Ce comité ordonna une enquête technique confiée à une commission instituée par un arrêté du ministre de l'Environnement du 19 juin 1989, avec le mandat suivant :

- a) faire le point sur la conformité de l'usine aux règles édictées en matière d'environnement, en ce qui concernait l'écoulement des eaux usées, le traitement des déchets liquides et solides, les émanations de gaz et la pollution sonore, ainsi que sur les aspects relatifs à la sécurité ; vérifier l'état des autorisations accordées à l'usine à cet effet ;
- b) faire le point sur la compatibilité de l'implantation de l'usine avec son environnement en ayant égard en particulier aux problèmes de la protection de la santé de la population, de la faune et de la flore, et aux problèmes de l'aménagement correct du territoire ;
- c) suggérer les actions à entreprendre pour acquérir toutes les données aptes à combler les lacunes qui seraient apparues pour l'étude des points a) et b) et indiquer les mesures à mettre en œuvre pour la protection de l'environnement.

22. Le 6 juillet 1989, en application de l'article 5 du DPR 175/88, l'usine communiqua le rapport de sécurité.

23. Le 24 juillet 1989, la commission présenta son rapport qui fut transmis au comité paritaire Etat-région. Celui-ci formula ses conclusions le 6 juillet 1990, fixant au 30 décembre 1990 la date de remise au ministre de l'Environnement du rapport prévu à l'article 18 du DPR 175/88 sur les risques d'accidents majeurs. Il recommandait par ailleurs :

- a) la réalisation d'études sur la compatibilité de l'usine avec l'environnement et sur la sécurité de l'établissement, des analyses complémentaires sur les scénarios catastrophe et sur la préparation et la mise en place de plans d'intervention d'urgence ;
- b) un certain nombre de modifications à apporter en vue de réduire de façon draconienne les émissions de substances dans l'atmosphère et d'améliorer le traitement des eaux usées, des changements techniques radicaux dans les cycles de production de l'urée et de l'azote, la réalisation d'études sur la pollution du sous-sol et sur l'assise hydrogéologique



de l'usine. Le délai prévu pour ces réalisations était de trois ans. Le rapport soulignait aussi la nécessité de résoudre le problème de la combustion des liquides et de la réutilisation des sels de soude.

Le comité demanda également la création, avant le 30 décembre 1990, d'un centre public d'hygiène industrielle ayant pour tâche de contrôler périodiquement les conditions d'hygiène et de respect de l'environnement de l'établissement et de servir d'observatoire épidémiologique.

24. Les problèmes liés au fonctionnement de l'usine firent l'objet, le 20 juin 1989, d'une question parlementaire au ministre de l'Environnement, et le 7 novembre 1989, au sein du Parlement européen, d'une question à la Commission des Communautés européennes. En réponse à cette dernière, le commissaire compétent indiqua : 1) que la société Enichem avait envoyé au gouvernement italien le rapport demandé sur la sécurité des installations, conformément à l'article 5 du DPR 175/88 ; 2) que sur la base de ce rapport, ledit gouvernement avait procédé à l'instruction de l'affaire comme prévu à l'article 18 du DPR 175/88 afin de contrôler la sécurité des installations et, le cas échéant, d'indiquer les mesures supplémentaires de sécurité qui s'avéreraient nécessaires ; et 3) qu'en ce qui concernait l'application de la directive Seveso, le gouvernement avait pris à l'égard de l'usine les mesures requises.

#### D. Les mesures d'information de la population

25. Les articles 11 et 17 du DPR 175/88 prévoient l'obligation, à la charge du maire et du préfet compétents, d'informer la population concernée sur les risques liés à l'activité industrielle en question, les mesures de sécurité adoptées, les plans d'urgence préparés et la procédure à suivre en cas d'accident.

26. Le 2 octobre 1992, le comité de coordination des activités de sécurité en matière industrielle formula son avis sur le plan d'urgence qui avait été préparé par le préfet de Foggia, conformément à l'article 17 § 1 du DPR 175/88. Le 3 août 1993, ce plan fut transmis au comité compétent du service pour la protection civile. Dans une lettre du 12 août 1993, le sous-secrétaire dudit service assura le préfet de Foggia que le plan serait soumis à bref délai au comité de coordination pour avis et exprima le souhait qu'il pût être rendu opérationnel le plus tôt possible, compte tenu des questions délicates liées à la planification d'urgence.

27. Le 14 septembre 1993, conformément à l'article 19 du DPR 175/88, les ministères de l'Environnement et de la Santé adoptèrent conjointement les conclusions sur le rapport de sécurité présenté par l'usine en juillet 1989. Celles-ci prescrivaient une série d'améliorations à apporter aux installations, à la fois en ce qui concernait la production de fertilisants et en cas de reprise de la production de

caprolactame (paragraphe 17 ci-dessus). Elles donnaient au préfet des indications concernant le plan d'urgence de son ressort et les mesures d'information de la population prescrits par l'article 17 dudit DPR.

Toutefois, dans un courrier du 7 décembre 1995 à la Commission européenne des Droits de l'Homme, le maire de Monte Sant'Angelo affirma qu'à cette dernière date, l'instruction en vue des conclusions prévues par l'article 19 se poursuivait et qu'aucun document concernant ces conclusions ne lui était parvenu. Il précisait que la municipalité attendait toujours de recevoir des directives du service de la protection civile afin d'arrêter les mesures de sécurité à prendre et les règles à suivre en cas d'accident et à communiquer à la population, et que les mesures visant l'information de la population seraient prises immédiatement après les conclusions de l'instruction, dans l'hypothèse d'un redémarrage de la production de l'usine.

## II. Le droit interne pertinent

28. En ce qui concerne les obligations d'information en matière de sécurité pour l'environnement et pour les populations intéressées, l'article 5 du DPR 175/88 prévoit que l'entreprise exerçant des activités dangereuses doit notifier aux ministères de l'Environnement et de la Santé un rapport contenant notamment des informations détaillées sur son activité, les plans d'urgence en cas d'accident majeur, les personnes chargées d'exécuter ce plan, ainsi que les mesures adoptées par l'entreprise pour réduire les risques pour l'environnement et pour la santé publique. Par ailleurs, l'article 21 du DPR 175/88 prévoit une peine pouvant aller jusqu'à un an d'emprisonnement pour tout entrepreneur ayant omis de procéder à la communication prévue par l'article 5.

29. A l'époque des faits, l'article 11 § 3 du DPR 175/88 prévoyait que le maire devait informer le public sur :

- a) le procédé de production ;
- b) les substances présentes et leur quantité ;
- c) les risques possibles pour les employés et ouvriers de l'usine, pour la population et pour l'environnement ;
- d) les conclusions sur le rapport sur la sécurité de l'usine notifié par cette dernière au sens de l'article 5, ainsi que sur les mesures complémentaires prévues par l'article 19 ;
- e) les mesures de sécurité et les règles à suivre en cas d'accident.

D'autre part, le paragraphe 2 du même article précisait qu'afin d'assurer la protection des secrets industriels, toute personne chargée d'examiner les rapports ou les renseignements provenant des entreprises concernées ne devait pas divulguer les informations dont elle avait eu connaissance.

30. L'article 11 § 1 disposait que les données et les informations relatives aux activités industrielles recueillies

en application du DPR 175/88 ne pouvaient être utilisées que pour les buts pour lesquels elles avaient été demandées.

Cette disposition a été en partie modifiée par le décret-loi n° 461 du 8 novembre 1995 et prévoit, en son paragraphe 2, que l'interdiction de divulgation découlant du secret industriel est exclue pour certaines informations, à savoir celles contenues dans une fiche d'information devant être rédigée et envoyée au ministère de l'Environnement et au comité technique régional ou interrégional par l'entreprise concernée. Les obligations d'information à la charge du maire restent en tout cas inchangées, et figurent aujourd'hui au paragraphe 4.

31. L'article 17 du DPR 175/88 prévoit certaines obligations d'information également à la charge du préfet. En particulier, le paragraphe 1 de cette disposition (aujourd'hui devenu 1 *bis*) dispose que le préfet doit préparer un plan d'urgence, sur la base des informations fournies par l'usine concernée et le comité de coordination des activités de sécurité en matière industrielle, qui doit être communiqué par la suite au ministère de l'Intérieur et au service pour la sécurité civile. Le paragraphe 2 exige ensuite du préfet qu'après avoir préparé le plan d'urgence, il informe de façon adéquate la population intéressée sur les risques découlant de l'activité, sur les mesures de sécurité adoptées afin de prévenir un accident majeur, sur les mesures d'urgence prévues à l'extérieur de l'usine en cas d'accident majeur et sur les normes à suivre en cas d'accident. Les modifications apportées à cet article par le décret-loi mentionné ci-dessus consistent notamment en l'adjonction d'un nouveau paragraphe 1, prévoyant que le service pour la protection civile doit établir les critères de référence pour la planification d'urgence et l'adoption des mesures d'information du public par le préfet, ainsi qu'en l'abrogation du paragraphe 3, qui disposait que les mesures d'information prévues par le paragraphe 2 devaient être communiquées aux ministères de l'Environnement et de la Santé, ainsi qu'aux régions intéressées.

32. L'article 14 § 3 de la loi n° 349 du 8 juillet 1986, qui a institué en Italie le ministère de l'Environnement et introduisait en même temps les premières règles en matière de préjudice pour l'environnement, prévoit que quiconque a le droit d'accéder aux informations sur l'état de l'environnement disponibles, conformément aux lois en vigueur, auprès de l'administration, et peut en obtenir copie contre remboursement des frais.

33. Dans un arrêt du 21 novembre 1991 (n° 476), le Conseil de justice administrative pour la Sicile (*Consiglio di Giustizia amministrativa per la Regione siciliana*), qui pour cette région tient lieu de Conseil d'Etat, a établi que la notion d'informations sur l'état de l'environnement

inclut tous les renseignements concernant l'habitat dans lequel vit l'homme et qui ont trait à des éléments revêtant un certain intérêt pour la collectivité. Se fondant sur pareils critères, le Conseil de justice administrative a estimé injustifié le refus d'une municipalité de permettre à un particulier d'obtenir une copie des résultats des analyses sur le caractère potable ou non des eaux du territoire d'une commune.

### III. Les travaux du Conseil de l'Europe

34. Parmi les différents documents adoptés par le Conseil de l'Europe dans le domaine en cause dans la présente affaire, il y a lieu de citer en particulier la résolution 1087 (1996) de l'Assemblée parlementaire, relative aux conséquences de l'accident de Tchernobyl et adoptée le 26 avril 1996 (seizième séance). Se référant non seulement au domaine des risques liés à la production et à l'utilisation de l'énergie nucléaire dans le secteur civil mais aussi à d'autres domaines, cette résolution énonce que « l'accès du public à une information claire et exhaustive (...) doit être considéré comme l'un des droits fondamentaux de la personne ».

### PROCÉDURE DEVANT LA COMMISSION

35. Les requérantes ont saisi la Commission le 18 octobre 1988. Invoquant l'article 2 de la Convention, elles alléguaient que l'absence de mesures concrètes, notamment pour diminuer la pollution et les risques d'accidents majeurs liés à l'activité de l'usine, portait atteinte au respect de leur vie et de leur intégrité physique. Elles se plaignaient aussi de ce que la non-adoption par les autorités compétentes des mesures d'information sur les risques encourus par la population et les mesures à prendre en cas d'accidents majeurs, prévues notamment par les articles 11 § 3 et 17 § 2 du décret du président de la République n° 175/88, méconnaissait leur droit à la liberté d'information garanti par l'article 10.

36. La Commission a retenu la requête (n° 14967/89) le 6 juillet 1995 quant au grief tiré de l'article 10 et l'a rejetée pour le surplus. Dans son rapport du 29 juin 1996 (article 31), elle conclut, par vingt et une voix contre huit, qu'il y a eu violation de cette disposition. Le texte intégral de son avis et des trois opinions dissidentes dont il s'accompagne figure en annexe au présent arrêt<sup>4</sup>.

### CONCLUSIONS PRÉSENTÉES À LA COUR

37. Le Gouvernement conclut son mémoire en invitant la Cour, à titre principal, à rejeter la requête pour non-épuisement des voies de recours internes et, subsidiairement, à juger qu'il n'y a pas eu violation de l'article 10 de la Convention.

4. *Note du greffier* : pour des raisons d'ordre pratique il n'y figurera que dans l'édition imprimée (*Recueil des arrêts et décisions* 1998), mais chacun peut se le procurer auprès du greffe.

38. A l'audience, le conseil des requérantes a demandé à la Cour de juger qu'il y a eu violation des articles 10, 8 et 2 de la Convention et d'allouer à ses clientes une satisfaction équitable.

## EN DROIT

### I. Sur l'objet du litige

39. Devant la Commission, les requérantes ont présenté deux griefs. Elles se plaignaient en premier lieu de la non-adoption, par les autorités publiques, d'actions aptes à diminuer la pollution de l'usine chimique Enichem agricultura de Manfredonia (« l'usine ») et à éviter les risques d'accidents majeurs ; elles affirmaient que cette situation portait atteinte à leur droit au respect de leur vie et de leur intégrité physique garanti par l'article 2 de la Convention. Elles dénonçaient ensuite la non-adoption, par l'Etat italien, de mesures d'information sur les risques encourus et les comportements à adopter en cas d'accident majeur prévues par les articles 11 § 3 et 17 § 2 du décret du président de la République n° 175/88 (« le DPR 175/88 ») ; elles en inféraient une violation de leur droit à la liberté d'information mentionné à l'article 10 de la Convention.

40. Le 6 juillet 1995, la Commission, à la majorité, a accueilli l'exception préliminaire de non-épuisement soulevée par le Gouvernement à l'égard du premier point et a retenu le restant de la requête « tous moyens de fond réservés ».

Dans son rapport du 25 juin 1996, elle a examiné l'affaire sous l'angle de l'article 10 de la Convention et considéré cette disposition applicable et violée au motif qu'au moins entre l'adoption du DPR 175/88, en mai 1988, et la cessation de la production de fertilisants, en 1994, les autorités compétentes se devaient de prendre les mesures nécessaires afin que les requérantes, qui résidaient toutes dans une zone à haut risque, pussent « recevoir une information adéquate sur des questions intéressant la protection de leur environnement ». Huit membres de la Commission ont exprimé leur désaccord dans trois opinions dissidentes, dont deux mettent en évidence la possibilité d'une approche différente du litige, fondée sur l'applicabilité de l'article 8 de la Convention.

41. Les intéressées ont, dans leur mémoire à la Cour puis à l'audience, invoqué aussi les articles 8 et 2 de la Convention en arguant que le défaut des informations en question a enfreint leur droit au respect de leur vie privée et familiale et leur droit à la vie.

42. Devant la Cour, le délégué de la Commission s'est borné à confirmer la conclusion du rapport (à savoir la violation de l'article 10), tandis que le Gouvernement a déclaré que les griefs relatifs aux articles 8 et 2 dépassaient le cadre tracé par la décision sur la recevabilité.

Il y a donc lieu de déterminer avant tout les limites de la compétence *ratione materiae*.

43. La Cour souligne d'abord que sa compétence « s'étend à toutes les affaires concernant l'interprétation et l'application de la (...) Convention qui lui sont soumises dans les conditions prévues par l'article 48 » (article 45 de la Convention tel que modifié par le Protocole n° 9 pour les Etats qui ont ratifié celui-ci, comme l'Italie) et qu'« En cas de contestation sur le point de savoir si la Cour est compétente, la Cour décide » (article 49).

44. Elle rappelle ensuite que, maîtresse de la qualification juridique des faits de la cause, elle ne se considère pas comme liée par celle que leur attribuent les requérants, les gouvernements ou la Commission. En vertu du principe *jura novit curia*, elle a par exemple étudié d'office plus d'un grief sous l'angle d'un article ou paragraphe que n'avaient pas invoqué les comparants, et même d'une clause au regard de laquelle la Commission l'avait déclaré irrecevable tout en le retenant sur le terrain d'une autre. Un grief se caractérise par les faits qu'il dénonce et non par les simples moyens ou arguments de droit invoqués (voir l'arrêt Powell et Rayner c. Royaume-Uni du 21 février 1990, série A n° 172, p. 13, § 29).

La plénitude de sa juridiction ne joue que dans les limites de l'« affaire », lesquelles sont fixées par la décision de recevabilité de la requête. A l'intérieur du cadre ainsi tracé, la Cour peut traiter toute question de fait ou de droit qui surgit pendant l'instance engagée devant elle (voir, parmi beaucoup d'autres, l'arrêt Philis c. Grèce du 27 août 1991, série A n° 209, p. 19, § 56).

45. En l'espèce, les moyens tirés des articles 8 et 2 ne figuraient pas expressément dans la requête et les mémoires initiaux des intéressées devant la Commission. Ils présentent cependant une connexité manifeste avec celui qui s'y trouvait exposé, l'information des requérantes, résidant toutes à un kilomètre à peine de l'usine, pouvant avoir des répercussions sur leur vie privée et familiale et leur intégrité physique.

46. Eu égard à ce qui précède ainsi qu'au texte de la décision de la Commission sur la recevabilité, la Cour estime pouvoir se placer sur le terrain des articles 8 et 2 de la Convention en sus de l'article 10.

## II. SUR LA VIOLATION ALLÉGUÉE DE L'ARTICLE 10 DE LA CONVENTION

47. Les requérantes se prétendent victimes d'une violation de l'article 10 de la Convention, ainsi libellé :

« 1. Toute personne a droit à la liberté d'expression. Ce droit comprend la liberté d'opinion et la liberté de recevoir ou de communiquer des informations ou des idées sans qu'il puisse y avoir ingérence d'autorités publiques

et sans considération de frontière. Le présent article n'empêche pas les Etats de soumettre les entreprises de radiodiffusion, de cinéma ou de télévision à un régime d'autorisations.

2. L'exercice de ces libertés comportant des devoirs et des responsabilités peut être soumis à certaines formalités, conditions, restrictions ou sanctions prévues par la loi, qui constituent des mesures nécessaires, dans une société démocratique, à la sécurité nationale, à l'intégrité territoriale ou à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale, à la protection de la réputation ou des droits d'autrui, pour empêcher la divulgation d'informations confidentielles ou pour garantir l'autorité et l'impartialité du pouvoir judiciaire. »

Le manquement découlerait de la non-adoption par les autorités compétentes de mesures d'information de la population sur les risques encourus et sur les mesures à prendre en cas d'accident lié à l'activité de l'usine.

#### A. Sur l'exception préliminaire du Gouvernement

48. Le Gouvernement soulève, comme déjà devant la Commission, une exception de non-épuisement des voies de recours internes articulée en deux branches.

La première repose sur le recours en référé prévu à l'article 700 du code de procédure civile. Si les requérantes craignaient un danger immédiat lié à l'activité de l'usine, elles auraient pu et dû saisir le juge afin d'obtenir une décision qui leur aurait immédiatement permis de protéger leurs droits. Le Gouvernement reconnaît ne pas fournir d'exemples d'application de cette disposition à des cas analogues, mais il affirme qu'abstraction faite de la possibilité d'utiliser cette disposition à l'encontre de la puissance publique, l'article 700 peut à coup sûr être utilisé envers une usine lorsque, comme ce serait le cas en l'espèce, celle-ci n'a pas préparé le rapport de sécurité exigé par l'article 5 du DPR 175/88 (paragraphe 28 ci-dessus).

La seconde branche porte sur la circonstance que les requérantes n'ont pas saisi le juge pénal pour se plaindre du défaut des informations pertinentes, notamment de la part de l'usine, l'article 21 du DPR susmentionné sanctionnant au pénal ce type d'omissions.

49. Selon la Cour, aucun des deux recours n'aurait permis d'atteindre le but visé par les intéressées.

Même si le Gouvernement n'a pu prouver l'efficacité du recours en référé, le contentieux lié à l'environnement dans le domaine en question n'ayant pas encore fourni de jurisprudence, l'article 700 du code de procédure civile aurait été un remède exploitable si le grief des intéressées avait porté sur l'absence de mesures visant la réduction ou l'élimination de la pollution ; telle a été d'ailleurs la

conclusion de la Commission au stade de la recevabilité de la requête (paragraphe 40 ci-dessus). En l'occurrence, il s'agissait en réalité de l'absence d'informations sur les risques encourus et les mesures à prendre en cas d'accident, alors que le recours en référé aurait vraisemblablement abouti à la suspension de l'activité de l'usine.

Quant au volet pénal, le rapport de sécurité a été transmis par l'usine le 6 juillet 1989 (paragraphe 22 ci-dessus) et ce recours aurait pu tout au plus déboucher sur la condamnation des responsables de l'usine, mais certainement pas sur la communication d'informations aux requérantes.

Il y a donc lieu d'écarter l'exception.

#### B. Sur le bien-fondé du grief

50. Reste à savoir si l'article 10 de la Convention est applicable et a été enfreint.

51. Selon le Gouvernement, cette disposition se limite à garantir la liberté de recevoir des informations sans entraves de la part d'un Etat et n'impose aucune obligation positive. En témoignerait le fait que la résolution 1087 (1996) de l'Assemblée parlementaire du Conseil de l'Europe et la directive 90/313/CEE du Conseil des Communautés européennes, relatives aux risques pouvant découler de certaines activités industrielles dangereuses, ne parlent pas d'un droit mais d'un simple accès à l'information. Si une obligation positive d'informer existait, elle serait « extrêmement difficile à mettre en œuvre » car il faudrait déterminer les modalités et le moment de la divulgation des informations ainsi que les autorités responsables de celle-ci et ses destinataires.

52. Avec les requérantes, la Commission estime que l'information du public représente désormais l'un des instruments essentiels de protection du bien-être et de la santé de la population dans les situations de danger pour l'environnement. Par conséquent, les mots « ce droit comprend (...) la liberté de recevoir (...) des informations », contenus au paragraphe 1 de l'article 10, devraient s'interpréter comme attribuant un véritable droit à recevoir des informations, notamment de la part des administrations compétentes, dans le chef des personnes appartenant à des populations ayant été ou pouvant être affectées par une activité industrielle, ou d'une autre nature, dangereuse pour l'environnement.

L'article 10 imposerait aux Etats non seulement de rendre accessibles au public les informations en matière d'environnement, exigence à laquelle le droit italien semble pouvoir déjà répondre, notamment en vertu de l'article 14 § 3 de la loi n° 349, mais aussi des obligations positives de collecte, d'élaboration et de diffusion de ces informations qui, par leur nature, ne pourraient être autrement portées à la connaissance du public. La protection assurée par l'article 10 jouerait donc un rôle

préventif à l'égard des violations potentielles de la Convention en cas d'atteintes graves à l'environnement, cette disposition entrant en jeu avant même qu'une atteinte directe à d'autres droits fondamentaux – tels le droit à la vie ou celui au respect de la vie privée et familiale – ne se produise.

53. La Cour ne souscrit pas à cette thèse. L'existence d'un droit pour le public de recevoir des informations a été maintes fois reconnue par elle dans des affaires relatives à des restrictions à la liberté de la presse, comme corollaire de la fonction propre aux journalistes de diffuser des informations ou des idées sur des questions d'intérêt public (voir, par exemple, les arrêts *Observer* et *Guardian c. Royaume-Uni* du 26 novembre 1991, série A n° 216, p. 30, § 59 b), et *Thorgeir Thorgeirson c. Islande* du 25 juin 1992, série A n° 239, p. 27, § 63). Les circonstances de l'espèce se distinguent toutefois nettement de celles des affaires susmentionnées car les requérantes se plaignent d'un dysfonctionnement du système instauré par le DPR 175/88, qui avait transposé en droit italien la directive 82/501/CEE du Conseil des Communautés européennes (directive « Seveso »), concernant les risques d'accidents majeurs liés à certaines activités industrielles dangereuses pour l'environnement et le bien-être des populations concernées. En effet, s'il est vrai que le préfet de Foggia prépara le plan d'urgence sur la base du rapport fourni par l'usine et que ce plan fut communiqué au service de la protection civile le 3 août 1993, à ce jour les requérantes n'ont pas reçu les informations litigieuses (paragraphes 26 et 27 ci-dessus).

La Cour rappelle que la liberté de recevoir des informations, mentionnée au paragraphe 2 de l'article 10 de la Convention, « interdit essentiellement à un gouvernement d'empêcher quelqu'un de recevoir des informations que d'autres aspirent ou peuvent consentir à lui fournir » (arrêt *Leander c. Suède* du 26 mars 1987, série A n° 116, p. 29, § 74). Ladite liberté ne saurait se comprendre comme imposant à un Etat, dans des circonstances telles que celles de l'espèce, des obligations positives de collecte et de diffusion, *motu proprio*, des informations.

54. En conclusion, l'article 10 ne s'applique pas en l'espèce.

55. Au vu du paragraphe 45 ci-dessus, il échet d'examiner l'affaire sous l'angle de l'article 8 de la Convention.

### III. Sur la Violation Alléguée de l'article 8 de la Convention

56. Les requérantes se prétendent devant la Cour, sur la base des mêmes faits, victimes d'une violation de l'article 8 de la Convention, ainsi libellé :

« 1. Toute personne a droit au respect de sa vie privée et familiale, de son domicile et de sa correspondance.

2. Il ne peut y avoir ingérence d'une autorité publique dans l'exercice de ce droit que pour autant que cette ingérence est prévue par la loi et qu'elle constitue une mesure qui, dans une société démocratique, est nécessaire à la sécurité nationale, à la sûreté publique, au bien-être économique du pays, à la défense de l'ordre et à la prévention des infractions pénales, à la protection de la santé ou de la morale, ou à la protection des droits et libertés d'autrui. »

57. La Cour a pour tâche de rechercher si l'article 8 de la Convention s'applique et a été enfreint.

Elle note d'abord que les intéressées résident toutes à Manfredonia, à un kilomètre environ de l'usine en question qui, à cause de sa production de fertilisants et de caprolactame, a été classée à haut risque en 1988, en application des critères retenus par le DPR 175/88.

Au cours de son cycle de fabrication l'usine a libéré de grandes quantités de gaz inflammable ainsi que d'autres substances nocives dont de l'anhydride d'arsenic. D'ailleurs, en 1976, à la suite de l'explosion de la tour de lavage des gaz de synthèse d'ammoniaque, plusieurs tonnes de solution de carbonate et de bicarbonate de potassium, contenant de l'anhydride d'arsenic, s'étaient échappées rendant nécessaire l'hospitalisation de 150 personnes en raison d'une intoxication aiguë par l'arsenic.

En outre, dans son rapport du 8 décembre 1988, la commission technique nommée par la municipalité de Manfredonia affirmait notamment que, à cause de la position géographique de l'usine, les émissions de substances dans l'atmosphère étaient souvent canalisées vers la ville (paragraphes 14–16 ci-dessus).

L'incidence directe des émissions nocives sur le droit des requérantes au respect de leur vie privée et familiale permet de conclure à l'applicabilité de l'article 8.

58. La Cour estime ensuite que les requérantes ne sauraient passer pour avoir subi de la part de l'Italie une « ingérence » dans leur vie privée ou familiale : elles se plaignent non d'un acte, mais de l'inaction de l'Etat. Toutefois, si l'article 8 a essentiellement pour objet de prémunir l'individu contre des ingérences arbitraires des pouvoirs publics, il ne se contente pas d'astreindre l'Etat à s'abstenir de pareilles ingérences : à cet engagement plutôt négatif peuvent s'ajouter des obligations positives inhérentes à un respect effectif de la vie privée ou familiale (arrêt *Airey c. Irlande* du 9 octobre 1979, série A n° 32, p. 17, § 32).

En l'occurrence, il suffit de rechercher si les autorités nationales ont pris les mesures nécessaires pour assurer la protection effective du droit des intéressées au respect de leur vie privée et familiale garanti par l'article 8 (arrêt *López Ostra c. Espagne* du 9 décembre 1994, série A n° 303-C, p. 55, § 55).

59. Le 14 septembre 1993, conformément à l'article 19 du DPR 175/88, les ministères de l'Environnement et

de la Santé adoptèrent conjointement des conclusions sur le rapport de sécurité présenté par l'usine en juillet 1989. Celles-ci prescrivaient des améliorations à apporter aux installations, à la fois pour la production en cours de fertilisants et en cas de reprise de la production de caprolactame. Elles donnaient au préfet des indications concernant le plan d'urgence – qu'il avait préparé en 1992 – et les mesures d'information de la population prescrites par l'article 17 dudit DPR.

Toutefois, dans un courrier du 7 décembre 1995 à la Commission européenne des Droits de l'Homme, le maire de Monte Sant'Angelo affirma qu'à cette dernière date, l'instruction en vue des conclusions prévues par l'article 19 se poursuivait, et qu'aucun document concernant ces conclusions ne lui était parvenu. Il précisait que la municipalité attendait toujours de recevoir des directives du service de la protection civile afin d'arrêter les mesures de sécurité à prendre et les règles à suivre en cas d'accident et à communiquer à la population, et que les mesures visant l'information de la population seraient prises immédiatement après les conclusions de l'instruction, dans l'hypothèse d'un redémarrage de la production de l'usine (paragraphe 27 ci-dessus).

60. La Cour rappelle que des atteintes graves à l'environnement peuvent toucher le bien-être des personnes et les priver de la jouissance de leur domicile de manière à nuire à leur vie privée et familiale (voir, *mutatis mutandis*, l'arrêt López Ostra précité, p. 54, § 51). En l'espèce, les requérantes sont restées, jusqu'à l'arrêt de la production de fertilisants en 1994, dans l'attente d'informations essentielles qui leur auraient permis d'évaluer les risques pouvant résulter pour elles et leurs proches du fait de continuer à résider sur le territoire de Manfredonia, une commune aussi exposée au danger en cas d'accident dans l'enceinte de l'usine.

La Cour constate donc que l'Etat défendeur a failli à son obligation de garantir le droit des requérantes au respect de leur vie privée et familiale, au mépris de l'article 8 de la Convention.

Par conséquent, il y a eu violation de cette disposition.

#### IV. Sur la violation alléguée de l'article 2 de la convention

61. Evoquant le décès d'ouvriers de l'usine, dû au cancer, les requérantes affirment que le défaut des informations litigieuses a méconnu leur droit à la vie garanti par l'article 2 de la Convention, ainsi libellé :

« 1. Le droit de toute personne à la vie est protégé par la loi. La mort ne peut être infligée à quiconque intentionnellement, sauf en exécution d'une sentence capitale prononcée par un tribunal au cas où le délit est puni de cette peine par la loi.  
2. La mort n'est pas considérée comme infligée en violation de cet article dans les cas où elle résulterait d'un recours à la force rendu absolument

nécessaire :

- a) pour assurer la défense de toute personne contre la violence illégale ;
- b) pour effectuer une arrestation régulière ou pour empêcher l'évasion d'une personne régulièrement détenue ;
- c) pour réprimer, conformément à la loi, une émeute ou une insurrection. »

62. Eu égard à la conclusion relative à la violation de l'article 8, la Cour n'estime pas nécessaire d'examiner l'affaire aussi sous l'angle de l'article 2.

#### V. Sur l'application de l'article 50 de la convention

63. Aux termes de l'article 50 de la Convention,

« Si la décision de la Cour déclare qu'une décision prise ou une mesure ordonnée par une autorité judiciaire ou toute autre autorité d'une Partie Contractante se trouve entièrement ou partiellement en opposition avec des obligations découlant de la (...) Convention, et si le droit interne de ladite Partie ne permet qu'imparfaitement d'effacer les conséquences de cette décision ou de cette mesure, la décision de la Cour accorde, s'il y a lieu, à la partie lésée une satisfaction équitable. »

##### A. Préjudice

64. Les intéressées sollicitent la réparation d'un dommage « biologique » ; elles réclament 20 000 000 000 liras italiennes (ITL).

65. D'après le Gouvernement, les requérantes n'ont pas démontré avoir subi un dommage et ne l'ont même pas évoqué dans le détail. Pour le cas où la Cour retiendrait l'existence d'un préjudice moral, le constat de violation fournirait, le cas échéant, une satisfaction équitable suffisante.

66. Le délégué de la Commission invite la Cour à accorder aux intéressées une compensation adéquate et proportionnée au préjudice considérable dont elles ont pâti. Il suggère la somme de 100 000 000 ITL pour chaque requérante.

67. La Cour considère que les intéressées n'ont pas démontré l'existence d'un dommage matériel résultant du manque d'information dont elles se plaignent. Pour le reste, elle estime que les requérantes ont souffert un tort moral certain et décide de leur allouer la somme de 10 000 000 ITL à chacune.

##### B. Frais et dépens

68. Les intéressées ont obtenu l'assistance judiciaire devant la Cour pour un montant de 16 304 francs français, mais à l'issue de l'audience, leur conseil a déposé au greffe une demande tendant à l'octroi d'une somme plus importante au titre de ses honoraires.

69. Ni le Gouvernement ni le délégué de la Commission ne se prononcent à ce sujet.

70. Compte tenu du montant déjà accordé au titre de l'assistance judiciaire et du dépôt tardif de la demande en question (articles 39 § 1 et 52 § 1 du règlement B de la Cour), la Cour décide d'écarter celle-ci.

#### C. *Autres prétentions*

71. Les intéressées prient enfin la Cour d'obliger l'Etat défendeur à procéder à l'assainissement de toute la zone industrielle en question et à réaliser une étude épidémiologique sur le territoire et les populations concernées ainsi qu'une enquête destinée à mettre en évidence les éventuelles conséquences graves pour les habitants les plus exposés aux substances présumées cancérogènes.

72. Le Gouvernement trouve ces prétentions inadmissibles.

73. Selon le délégué de la Commission, la réalisation d'une enquête approfondie et efficace par les autorités nationales ainsi que la publication et la communication aux requérantes d'un rapport complet et précis sur tous les aspects pertinents de l'activité de l'usine pendant la période litigieuse, y compris les dommages effectivement causés à l'environnement et à la santé des personnes, seraient de nature à satisfaire, en plus du versement d'une satisfaction équitable, à l'obligation prévue à l'article 53 de la Convention.

74. La Cour relève que celle-ci ne l'habilite pas à accueillir pareille requête. Elle rappelle qu'il appartient à l'Etat de choisir les moyens à utiliser dans son ordre juridique pour se conformer aux dispositions de la Convention ou redresser une situation ayant entraîné une violation (voir, *mutatis mutandis*, les arrêts Zanghì c. Italie du 19 février 1991, série A n° 194-C, p. 48, § 26, Demicoli c. Malte du 27 août 1991, série A n° 210, p. 19, § 45, et Yagcı et Sargın c. Turquie du 8 juin 1995, série A n° 319-A, p. 24, § 81).

#### D. *Intérêts moratoires*

75. Selon les informations dont dispose la Cour, le taux légal applicable en Italie à la date d'adoption du présent arrêt est de 5 % l'an.

Par Ces Motifs, La Cour

1. *Rejette*, par dix-neuf voix contre une, l'exception préliminaire du Gouvernement ;
2. *Dit*, par dix-huit voix contre deux, que l'article 10 de la Convention ne s'applique pas en l'espèce ;
3. *Dit*, à l'unanimité, que l'article 8 de la Convention s'applique et a été violé ;

4. *Dit*, à l'unanimité, qu'il n'y a pas lieu d'examiner l'affaire aussi sur le terrain de l'article 2 de la Convention ;

5. *Dit*, à l'unanimité,

- a) que l'Etat défendeur doit verser, dans les trois mois, 10 000 000 (dix millions) liras italiennes à chaque requérante pour le dommage moral subi ;
- b) que ce montant est à majorer d'un intérêt simple de 5 % l'an à compter de l'expiration dudit délai et jusqu'au versement ;

6. *Rejette*, à l'unanimité, la demande de satisfaction équitable pour le surplus.

Fait en français et en anglais, puis prononcé en audience publique au Palais des Droits de l'Homme, à Strasbourg, le 19 février 1998.

*Signé* : Rudolf BERNHARDT  
Président

*Signé* : Herbert PETZOLD  
Greffier

Au présent arrêt se trouve joint, conformément aux articles 51 § 2 de la Convention et 55 § 2 du règlement B, l'exposé des opinions séparées suivantes :

- opinion concordante de M. Walsh ;
- opinion concordante de M<sup>me</sup> Palm, à laquelle se rallient MM. Bernhardt, Russo, Macdonald, Makarczyk et van Dijk ;
- opinion concordante de M. Jambrek ;
- opinion partiellement concordante et partiellement dissidente de M. Thór Vilhjálmsson ;
- opinion partiellement dissidente et partiellement concordante de M. Mifsud Bonnici.

*Paraphé* : R. B.

*Paraphé* : H. P.

#### OPINION CONCORDANTE DE M. LE JUGE WALSH (TRADUCTION)

Il faut se souvenir que, souvent, une méconnaissance de la Convention peut mettre en jeu d'autres articles que celui dont le requérant invoque la violation, mais je suis tout à fait d'accord qu'au vu des faits de la cause il est plus judicieux d'invoquer l'article 8 que l'article 10. La Convention et ses dispositions doivent s'interpréter de manière harmonieuse. Or, dans son arrêt, la Cour a brièvement évoqué l'article 2, mais ne s'est pas prononcée à ce sujet, alors qu'à mon sens il y a eu également infraction à l'article 2.

Selon moi, l'article 2 garantit aussi la protection de l'intégrité physique des requérants. De même, les dispositions de l'article 3 indiquent clairement que la

Convention s'étend à cette protection-là. J'estime qu'il y a eu en l'espèce violation de l'article 2 et que, vu les circonstances, il ne s'impose pas d'aller au-delà de cette disposition pour constater une violation.

**OPINION CONCORDANTE DE M<sup>ME</sup> LE JUGE PALM,  
À LAQUELLE SE RALLIENT MM. LES JUGES  
BERNHARDT, RUSSO, MACDONALD, MAKARCZYK  
ET VAN DIJK (TRADUCTION)**

Avec la majorité, j'ai conclu que l'article 10 n'est pas applicable en l'espèce. Ce faisant, j'ai fortement insisté sur la situation concrète qui était en cause, sans exclure pour autant que, dans des circonstances différentes, l'Etat pourrait avoir l'obligation positive de fournir au public les informations en sa possession et de diffuser celles qui, par nature, ne pourraient pas autrement venir à la connaissance du grand public. Ce point de vue n'est pas incompatible avec la teneur du paragraphe 53 de l'arrêt.

**OPINION CONCORDANTE DE M. LE JUGE JAMBREK  
(TRADUCTION)**

Dans leur mémoire, les requérantes se sont aussi plaintes expressément d'une violation de l'article 2 de la Convention. La Cour a estimé qu'il n'y avait pas lieu d'examiner l'affaire sous l'angle de cet article puisqu'elle avait conclu à la violation de l'article 8. Je souhaite néanmoins formuler quelques remarques quant à l'éventuelle applicabilité de l'article 2 en l'espèce.

Cet article dispose : « Le droit de toute personne à la vie est protégé par la loi. La mort ne peut être infligée à quiconque intentionnellement, sauf (...) ». A mon avis, la protection de la santé et de l'intégrité physique est liée tout aussi étroitement au « droit à la vie » qu'au « respect de la vie privée et familiale ». On pourrait faire un parallèle avec la jurisprudence de la Cour relative à l'article 3 en ce qui concerne l'existence de « conséquences prévisibles » : lorsque, *mutatis mutandis*, il existe des motifs sérieux de croire que la personne concernée court un risque réel de se trouver dans des circonstances mettant en danger sa santé et son intégrité physique et, partant, son droit à la vie, qui est protégé par la loi. Lorsqu'un gouvernement s'abstient de communiquer des informations au sujet de situations dont on peut prévoir, en s'appuyant sur des motifs sérieux, qu'elles présentent un danger réel pour la santé et l'intégrité physiques des personnes, alors une telle situation pourrait aussi relever de la protection de l'article 2, selon lequel « La mort ne peut être infligée à quiconque intentionnellement ».

Il se pourrait donc que le moment soit venu pour la jurisprudence de la Cour consacrée à l'article 2 (droit à la vie) d'évoluer, de développer les droits qui en découlent par implication, de définir les situations entraînant un risque réel et grave pour la vie ou les différents aspects du droit à la vie. L'article 2 semble pertinent et applicable en l'espèce,

dans la mesure où 150 personnes ont été conduites à l'hôpital pour empoisonnement grave à l'arsenic. Etant donné qu'elles entraînaient le rejet dans l'atmosphère de substances nocives, les activités de l'usine constituaient donc des « risques d'accidents majeurs dangereux pour l'environnement ».

En ce qui concerne l'article 10, j'estime qu'il pourrait être considéré comme applicable en l'espèce sous réserve d'une condition précise. Cet article prévoit que « Toute personne a droit à (...) recevoir (...) des informations ou des idées sans qu'il puisse y avoir ingérence d'autorités publiques (...). L'exercice de [ce droit] peut être soumis à certaines (...) restrictions (...) ». A mon avis, le libellé de l'article 10, et le sens s'attachant couramment aux mots utilisés, ne permettent pas de déduire qu'un Etat se trouve dans l'obligation positive de fournir des informations, sauf lorsqu'une personne demande/exige d'elle-même des informations dont le gouvernement dispose à l'époque considérée.

C'est pourquoi j'estime qu'il faut considérer qu'une telle obligation positive dépend de la condition suivante : les victimes potentielles du risque industriel doivent avoir demandé que certaines informations, preuves, essais, etc., soient rendus publics et leur soient communiqués par un service gouvernemental donné. Si le gouvernement ne satisfait pas à une telle demande et n'explique pas son absence de réponse de façon valable, alors celle-ci doit être considérée comme une ingérence de sa part, interdite par l'article 10 de la Convention.

**OPINION PARTIELLEMENT CONCORDANTE ET  
PARTIELLEMENT DISSIDENTE DE M. LE JUGE THÓR  
VILHJÁLMSOHN (TRADUCTION)**

En cette affaire, je souscris en principe à la conclusion et aux arguments exprimés par la majorité de la Commission. La Cour, pour sa part, est d'un autre avis. Alors même que j'aurais préféré que l'affaire soit traitée sous l'angle de l'article 10 de la Convention, il était aussi possible d'examiner les questions soulevées en l'espèce sur le terrain de l'article 8, comme la Cour l'a fait. C'est pourquoi j'ai voté avec la majorité en ce qui concerne cet article, ainsi que les articles 2 et 50 de la Convention.

**OPINION PARTIELLEMENT DISSIDENTE ET  
PARTIELLEMENT CONCORDANTE DE M. LE JUGE  
MIFSUD BONNICI (TRADUCTION)**

1. Au paragraphe 49 de l'arrêt, la Cour rejette l'exception préliminaire du Gouvernement selon laquelle les requérantes n'auraient pas éprouvé la suspension de l'activité de l'usine, je ne vois pas quel recours aurait pu être plus efficace pour redresser les violations dénoncées par les requérantes, dans la mesure où l'absence d'informations de la part des autorités aurait conduit



à la suspension des activités de l'usine. A l'occasion du procès, toutes les informations nécessaires auraient dû être communiquées pendant l'audience, ce qui aurait naturellement permis de redresser les violations de l'article 8.

4. Pour ce qui est de l'action pénale, un succès dans ce domaine aurait rendu possible l'ouverture d'une action en réparation, comme l'ordre juridique italien permet de le faire à toute personne victime d'une infraction (*delitto*), quelle qu'en soit la forme.

5. Il est donc clair que, non seulement l'ordre juridique italien mettait un certain nombre d'actions en justice à la disposition des requérantes, mais aussi que celles-ci ne s'en sont malheureusement pas prévaluées. Partant, j'estime qu'il aurait fallu accueillir l'exception préliminaire du Gouvernement.

6. La grande majorité de mes collègues en ayant jugé autrement, je n'avais pas d'autre solution que de me rallier à leur avis en ce qui concerne les autres points du dispositif.



Pierre BLEROT et quatorze la commune de Coussainville, à territoire de l'aéroport Charles-de-Gaulle à Roissy, ont fait AIR FRANCE, BRITISH AIRWAYS, AIR INTER, U.T.A. (Union des Transports Aériens) et TRANS WORLD AIRLINES (T.W.A.) pour obtenir, sur le fondement de l'article 141-2 du Code de l'aviation civile, l'indemnisation des dommages physiques et économiques causés par le survol fréquent et à basse altitude de leurs habitations par les avions de ces compagnies décollant et atterrissant à l'aéroport de Roissy.

Par jugement du 18 novembre a déclaré l'article 141-2 du Code de l'aviation civile applicable en l'espèce et désigné trois experts chargés de rechercher l'importance des dommages de toute nature subis par chacun des demandeurs ainsi que les éléments de fait permettant de déterminer dans quelle mesure chacune des compagnies assignées serait tenue d'en assurer la réparation.

Cette décision a été confirmée par arrêt de la Cour d'Appel de Paris du 22 février 1983.

Les pourvois formés contre cet arrêt ont été rejetés par la Cour de Cassation le 17 octobre 1984.

#### **AUDIENCE DU 26 JUIN 1986 1<sup>o</sup> CHAMBRE 1<sup>o</sup> SECTION N<sup>o</sup> 2 SSUITE**

Au vu des rapports déposés par les experts, le Tribunal a par jugement du 11 juillet 1984, ordonné un complément d'expertise afin de prendre en considération les aménagements techniques apportés par les Compagnies sur leurs appareils en vue de l'atténuation du bruit et de hiérarchiser les uns par rapport aux autres les effets cumulés pour les habitants de Goussainville des passages au-dessus de leur résidence des avions de chacune des Compagnies défenderesses.

Compte tenu des observations de l'expert Thouvenot sur l'impossibilité de procéder à cette hiérarchisation en différenciant le cas de chaque demandeur le Tribunal a, par un nouveau jugement du 25 avril 1985 modifié la mission de cet expert, en l'invitant à établir à diverses époques une échelle relative de classement des compagnies les unes par rapport aux autres en ce qui concerne les nuisances phoniques déterminées par les appareils qu'elles utilisent.

L'expert Thouvenot a déposé son complément de rapport.

Au vu des rapports techniques, immobiliers et médicaux, les demandeurs ont conclu les 6 mai 1983, 13 mars 1984 et 7 novembre 1985.

Ces conclusions tendent à la condamnation in solidum des cinq compagnies défenderesses à réparation de l'entier dommage résultant pour les demandeurs des conséquences du survol des aéronefs et, en conséquence, au paiement d'indemnités:

- pour dépréciation de la valeur de leur propriété avec mise à la charge des compagnies;
- soit des frais de déménagement et réinstallation,
- soit de s'offrir d'isolation, ou à défaut versement d'une rente pour troubles permanents dans leurs conditions d'existence,
- pour préjudice physiologique et psychique.

Les Compagnies défenderesses tendant au rejet de l'ensemble des demandes.

Elles font valoir tout d'abord la faute que aurait été commise par certains demandeurs en s'installant à Goussainville après le 6 août 1960, date de la réservation au plan d'aménagement et d'organisation de la Région Parisienne de la zone d'étude de l'Aérodrome Paris-Nord.

Plus généralement, elles contestent, au vu des rapports d'expertises – technique, médicale et immobilière – l'existence d'un lien de causalité entre les évolutions de chaque aéronef de chaque compagnie et les différents dommages que les demandeurs prétendent subir.

Subsidiairement, pour le cas où établi, les Compagnies, examinant le cas de chaque demandeur, critiquent notamment l'évaluation forfaitaire du trouble dans les conditions d'existence et la formulation de la demande pour autre préjudice d'ordre médical ou physiologique, ainsi que les estimations de la dépréciation retenus par l'expert immobilier et déclarent n'y avoir lieu à leur condamnation "in solidum".

Les demandeurs ont répliqué maintiennent leur prétentions à l'exception des époux Laski qui ne forment plus aucune demande.

#### **I – SUR LA FAUTE DES VICTIMES**

#### **AUDIENCE DU 26 JUIN 1986 1<sup>o</sup> CHAMBRE 1<sup>o</sup> SECTION N<sup>o</sup> 2 SUITE**

L.141-2 du Code de l'aviation civile qui prévoit la responsabilité de plein droit de l'exploitant pour les dommages causés par les évolutions de l'aéronef édicte en son alinéa 2 que cette responsabilité peut être écartée ou atténuée par la faute de la victime;

Attendu qu'en l'espèce, si une zone d'étude de l'aérodrome de Paris- Que l'installation de toute personne à proximité d'une zone d'implantation d'un aéroport don't le trafic doit entraîner à l'évidence des nuisances, constitue une imprévoyance fautive dès lors que la réalisation et la localisation de cet aéroport sont certaines et notoirement connues;

Que l'acceptation du risque ainsi pris en connaissance de cause, interdit toute indemnisation des dommages liés aux nuisances;

Nord dans le secteur de Roissy-en-France a été réservée dès le 6 août 1960 au plan d'aménagement et d'organisation de la Région Parisienne, la preuve n'est pas rapportée que cette réservation figurant dans le PADOG, document de travail pour l'administration, sans effet juridique pour les tiers, ait été porté à la connaissance de l'un ou l'autre des demandeurs par une mention sur un document administratif à lui délivré;

Qu'il ne s'agissait alors que d'une étude – que les décisions n'ont été prises que quatre ans plus tard – que le caractère certain de l'opération a été connu seulement par la publication de la déclaration d'utilité publique au Journal Officiel le 23 juin 1965;

Que selon le rapport de l'expert immobilier Rellay, le projet d'aménagement de l'aéroport de Roissy n'a pu être ignoré du public à partir de la seconde moitié de l'année 1965, époque du début des travaux;

Qu'au vu de ces éléments d'information sur la publicité officielle et de fait donnée à la réalisation de cet aéroport, il convient de retenir la date du 1<sup>er</sup> juillet 1985 comme seuil et d'exclure de toute indemnisation les personnes qui se sont installées délibérément à Goussainville postérieurement à cette date, soit par acquisition de terrains, soit par édification de constructions (avec permis de construire postérieur au 1<sup>er</sup> juillet 1965) sur des terrains leur appartenant par suite d'achat, de donation ou de succession;

## II – SUR LE LIEN DE CAUSALITE

Attendu qu'après avoir localisé les qu'elles étaient regroupées dans quatre zones d'agglomération, l'expert technique a fait procéder à mesures de bruit dans chacune de ces quatre zones, en indiquant l'heure de passage de chacun des avions et son type;

Que ces mesures font apparaître que chacun de ces appareils est source d'un bruit variant de 60 DBA à 97 DBA et et même plus de 100 DBA (Concorde) selon le type d'appareil et l'orientation de l'atterrissage ou du décollage;

Que ce niveau sonore même pris en son minimum excède de beaucoup le niveau moyen du bruit (40 à 45 ou 50 DBA selon les périodes du jour et de la nuit) dans une zone résidentielle semi-rurale, dans laquelle la commune de Goussainville a été classée par précédente décision, en considération de son environnement avant l'implantation de l'aéroport de Roissy;

Qu'il est ainsi prouvé que l'évolution de chacun des avions des Compagnies en cause est générateur de nuisances phoniques;

## AUDIENCE DU 26 JUIN 1986 1<sup>o</sup> CHAMBRE 1<sup>o</sup> SECTION N<sup>o</sup> 2 SUITE

Attendu que l'expert technique utilisant une méthode reconnue adaptée à la situation par le précédent jugement du 25 avril 1985, a pour déterminer l'imputabilité des nuisances engendrées par les passages répétés des avions de chaque compagnie, eu égard à leurs types pris en considération les coefficients de modulation de redevances d'atterrissage qui sont calculées en fonction des niveaux de bruit des aéronefs classés eux-mêmes en cinq groupes acoustiques;

Qu'au vu des facteurs de redevances d'atterrissage dressés par l'aéroport de Paris, à l'occasion du trafic des appareils de chaque compagnie à <sup>7</sup> et caractéristiques Roiss, l'expert a pu indiquer de la façon la plus approchée possible dans quelles proportions les nuisances sonores étaient imputables aux effets des mouvements des avions de chacune des compagnies;

Attendu qu'ainsi a été établi le lien de causalité entre les évolutions des aéronefs appartenant à chacune des compagnies en cause et les nuisances sonores dans chaque zone d'agglomération de Goussainville;

Attendu qu'il y a lieu de rechercher les conséquences dommageables de ces nuisances pour les demandeurs installés dans chacune de ces zones après le 1<sup>er</sup> juillet 1965, en tenant compte de la diminution au cours des dernières années, des émissions d'énergie sonore par les appareils exploités par les Compagnies défenderesses (cf, dernier rapport de l'expert Thouvenot);

## III – SUR LES DOMMAGES

Attendu que pour apprécier et individualiser les conséquences dommageables de ces nuisances, il convient de prendre en considération l'environnement, la gêne engendrée par le survol d'avions étant moins importante dans un lieu déjà bruyant pour d'autres causes que dans un endroit calme;

Attendu que l'expert technique a précisé dans son rapport que dans la zone n<sup>o</sup> 1, en toute circonstance, la gêne due au trafic aérien est supérieure à celle résultant de l'environnement;

Que dans les zones Nos 2 et 3, les bruits résultant de l'environnement et ceux provenant des avions sont du même ordre quand le vent vient d'est, mais que les bruits des avions l'emportent par vent d'ouest et la gêne qui en résulte est notable en période de grand trafic;

Que dans la zone n<sup>o</sup> 4, les bruits résultant de l'environnement sont aussi et même quelque fois plus

agressifs que ceux qui résultent des avions, principalement à cause de la proximité de la voie ferrée;

Que toutefois ces observations ne sauraient priver les personnes résidant dans cette zone n° 4 d'obtenir une indemnisation pour les troubles dus au passage des avions, s'agissant de faits dommageables distincts des nuisances liées au voisinage de la voie ferroviaire;

#### a) Préjudice immobilier

Attendu que l'expert a calculé la dépréciation des propriétés des demandeurs en se référant principalement à cette distinction, retenant pour:

- la zone n° 1 une dépréciation de 20%
- la zone n° 2 une dépréciation de 15%
- la zone n° 3 une dépréciation de 20%
- la zone n° 4 une dépréciation de 10%;

Que le pourcentage de dépréciation par lui proposé doit être retenu, bien que la gêne phonique ait été considérée par l'expert technique équivalente pour les zones 2 et 3, dès lors que selon l'expert immobilier il existe en cette zone 3 une nuisance plus importante qu'en zone 2 en raison des projections de kérosène;

Attendu que les Compagnies défenderesses, se référant à une autre expertise établie à leur demande par M. SELLON, critiquent le rapport de l'expert désigné par le Tribunal au motif que ce dernier n'aurait pas tenu compte de la hausse constante des prix du terrain à Goussainville, hausse qui serait due à l'augmentation de population liée à l'implantation de l'aéroport de Roissy; qu'elles déduisent du rapport de M. Sellon que les demandeurs n'auraient subi aucun préjudice foncier;

Mais attendu qu'il ressort d'une lettre du Maire de Goussainville en date du 29 novembre 1977 que si la population s'est accrue fortement dans sa commune entre 1962 et 1977, le développement de population n'a pas eu lieu dans la zone de bruit de l'aéroport de Roissy;

Que l'expert Sellon a pris des éléments de comparaison sans tenir compte de cette distinction entre zone de bruit et zone extérieure;

Qu'il a affirmé que les prix du terrain à Goussainville n'avaient cessé de grimper pour atteindre des niveaux bien supérieurs à ceux observés dans les communes rurales, sans assortir cette considération d'exemples d'évolution de prix dans d'autres communes de la banlieue parisienne;

Attendu que dès lors le rapport de M. Sellon ne saurait permettre de rejeter les appréciations de l'expert judiciaire Monsieur Rellay, lequel n'a d'ailleurs pas négligé le facteur de hausse lié à l'installation de l'aéroport et a procédé avec grande circonspection pour évaluer les propriétés des riverains de l'aéroport;

Que la méthode d'évaluation par lui proposée, à savoir valeur du terrain et valeur de la construction, selon la surface développée hors oeuvre pondérée, mérite d'être retenue;

Qu'à juste titre, l'expert n'a pas estimé les propriétés des demandeurs sur une valeur de reconstruction, dès lors que le dommage ne résulte pas de la destruction ou de dégâts des bâtiments, mais d'une diminution de valeur vénale liée à l'existence de nuisances;

Que, contrairement aux affirmations des demandeurs rien n'indique que l'expert ait intégré la dépréciation dans ses calculs de valeur vénale;

Qu'il a appliqué le coefficient de dépréciation après avoir dégerminé la valeur de chaque immeuble en fonction de sa consistance, de son état et de son équipement;

Que les éléments fournis par les demandeurs ne permettent pas de remettre en cause les bases de calcul retenues par l'expert, aucune comparaison valable ne pouvant être établie entre la valeur de maisons anciennes ou édifiées depuis plusieurs années et le coût d'immeubles en cours de construction;

Attendu qu'il y a lieu de retenir les appréciations de l'expert sur le montant des dépréciations des immeubles appartenant à chaque demandeur;

Que le montant de la dépréciation doit seulement être revalorisé en fonction de la variation de l'indice du coût de la construction publié par l'INSEE à la date du dépôt du rapport de l'expert immobilier, le 10 Mars 1983, et de celui publié au jour du jugement, ce pour tenir compte de l'évolution du marché immobilier entre-temps;

#### b) Autres préjudices

Attendu que le médecin expert, après avoir procédé à une étude très sérieuse sur les conséquences du bruit sur l'homme (annexe A de son rapport), signalé la difficulté d'en apprécier les effets nocifs en raison notamment:

- d'absence de normes de tolérabilité pour les bruits discontinus ne lésant pas l'appareil auditif,
- de l'impossibilité de dissocier les phénomènes attribuables au stress "bruit d'avion" de ce qui est attribuable aux autres stress, en particulier aux autres agressions sonores,

rappelé le caractère subjectif important de ces phénomènes, tout en reconnaissant qu'ils causent certainement un préjudice à l'homme, a conclu comme suit: "Le bruit a bien des effets nocifs "sur la santé de l'individu par la gêne qu'il "entraine. Il est très vraisemblablement cause "de troubles psycho-physiologiques précis, mais "dont il est impossible actuellement de prouver "les relations directes avec l'agression sonore."

Attendu que de telles conclusions ne permettent pas d'affirmer l'existence d'un lien de causalité entre les agressions sonores dues au mouvement des avions et les troubles d'ordre physiologique allégués par les demandeurs ou constatés par les médecins experts;

Que seule peut être retenue comme conséquence certaine et directe de ces agressions sonores une gêne dommageable dans les conditions d'existence des riverains;

Que cette gêne est certaine, quelle que soit la réceptivité personnelle de chaque individu; qu'elle consiste essentiellement en:

- troubles dans les conversations, l'écoute de la radio, de la télévision, de la musique,
- perturbation dans la concentration intellectuelle,
- troubles dans le cadre de vie, frustration de jouissance du jardin, de l'air extérieur par obligation de tenir portes et fenêtres fermées;

Attendu que les indemnités réparatrices de ces troubles doivent être fixées eu égard à l'importance plus ou moins grande de cette gêne suivant:

- le lieu de résidence de l'intéressé (zone 2, 2, 3, 4)
- le temps pendant lequel il est soumis aux agressions sonores par suite de ses activités,
- la répercussion sur le sommeil et le caractère de l'intéressé;

Attendu qu'aux indemnités ainsi calculés, en réparation d'une part du préjudice immobilier (dépréciation) subi par les demandeurs, d'autre part de la gêne à eux causée, il convient, pour permettre aux intéressés d'échapper à l'avenir aux nuisances dont ils se plaignent, d'ajouter une indemnité de déménagement;

Que le montant de cette indemnité doit être fixé forfaitairement, compte tenu notamment de la surface habitable de la propriété de chacun des demandeurs;

Attendu que les indemnités de dépréciation immobilière et de déménagement seront attribuées au seul mari en qualité d'administrateur de la communauté, pour les époux mariés sous un régime de communauté;

#### **IV - SUR LA PART DE PREJUDICE JURIDIQUEMENT REPARABLE PAR LES DEFENDERESSES**

Attendu que les mesures effectuées en janvier 1982 sous le contrôle de l'expert technique Thouvenot concernent l'ensemble du trafic aérien de Roissy;

Que, selon les statistiques publiées par l'aéroport de Paris et rappelées par l'expert Thouvenot (dans sa réponse aux

dières des parties), l'activité aérienne cumulée moyenne des cinq compagnies défenderesses a représenté:

- pour le 1<sup>er</sup> trimestre 1979: 70 à 75%
- pour le 4<sup>ème</sup> trimestre 1980: 70 à 71,5%

du trafic total de Roissy;

Qu'en raison des efforts effectués par les Compagnies pour diminuer les émissions d'énergie sonore par leurs appareils, les nuisances phoniques ressenties à Goussainville sont, selon le dernier rapport de l'expert Thouvenot, imputables aux cinq compagnies en cause.

- pour le 1<sup>er</sup> trimestre 1984 à concurrence de 63%
- pour le 1<sup>er</sup> trimestre 1985 à concurrence de 56%

Attendu que l'obligation à réparation de ces cinq compagnies ne peut être étendue aux dommages causés par l'ensemble du trafic aérien de toutes les compagnies desservant;

Qu'en effet, si la gêne causée aux riverains par les passages fréquents d'avions est ressentie par eux comme un tout, cet effet n'est que partiellement le fait de divers exploitants qui ne peuvent donc être individuellement condamnés à réparer l'intégralité du préjudice global dont une fraction seulement leur est imputable;

Qu'il s'ensuit d'une part que le préjudice dont les demandeurs peuvent juridiquement obtenir réparation des cinq compagnies en cause doit être limité à 67% de leur préjudice global depuis 1974.

Qu'il s'ensuit d'autre part que le caractère "insécable" de ce préjudice ne doit pas conduire à mettre à la charge des cinq compagnies défenderesses une responsabilité in solidum;

Que, compte tenu de l'évolution de leur part respective de trafic au cours des années rappelée par l'expert Thouvenot en ses rapports, le montant du préjudice juridiquement réparable par ces compagnies doit être réparti entre elles comme suit:

• AIR FRANCE	71,70%
• U.T.A.	6,15%
• AIR INTER	8,05%
• BRITISH AIRWAYS	6,05%
• T.W.A.	8,05%

Attendu qu'il convient en conséquence de fixer comme suit le montant des indemnités qui doivent être réglées aux demandeurs par chacune des compagnies défenderesses par chacune des compagnies défenderesses, dans la proportion ci-dessus indiquée;

NOM AGE ACTUEL PROFESSION	ZONE DE RESIDENCE	TEMPS DE RESIDENCE L'EXPERTISE MEDICALE	IMPORTANCE DE LA GENE SELON	OBSERVATIONS	ÉVALUATION DU DOMMAGE CONSECUTIF A L'ENSEMBLE DU TRAFIC AERIEN DE ROISSY	
1	2	3	4	5	6 Dépréciation à revaloriser a/c du 10.3.83 sauf exceptions	
					7 Frais de déménagement	
					8 Gene	
BLERIoT Pierre 57 ans Agent technique dessinateur Projecteu	4	Toute l'année y compris fins de semaines sauf congés annuels et temps de travail	Assez importante		52 500	25 000
BLERIoT née PACHOD Ginette 59 ans Cadre administratif	4	Id	Importante		0	30 000
CHAPALAIN Joseph 72 ans Retraité	4	Toute l'année sauf vacances	Légère	Acquisition le 28.2.1967	0	0
CHAPALAIN née LARVOR Alice 67 ans	4	Id	Assez importante		0	0
BOUDON Antoine 78 ans, retraité	4	En permanence	Importante		0	48 000
BOUDON née BOITEUX Jeanne 82 ans, retraitée	4	Id	modérée		32 000	40 000
THILL Marcel 55 ans, Cadre administratif	1	Toute l'année sauf temps de travail et congés annuels	Modérée		84 000	50 000
THILL née KIEFFER 53 ans sans prof.	1	En permanence sauf vacances	Modérée		0	50 000

NOM AGE ACTUEL PROFESSION	ZONE DE RESIDENCE	TEMPS DE RESIDENCE L'EXPERTISE	IMPORTANCE DE LA GENE SELON	OBSERVATIONS	EVALUATION DU DOMMAGE CONSECUTIF A L'ENSEMBLE DU TRAFIC AERIEN DE ROISSY
BRAY Jean 67 ans, retraité	2	Toute l'année sauf vacances	Très légère		60 000 10 000 35 000
BRAY née LEDoux Suzanne 60 ans	2	Toute l'année sauf congés annuels	Importante		0 0 44 000
CHICOT Claude 49 ans Cadre comptable	2	Toute l'année y compris fins de semaines sauf temps de travail et congés annuels	Assez importante		72 750 10 000 40 000
GOBY Jean 48 ans bobinier	3	Toute l'année y compris fins de semaines sauf temps de travail et congés annuels	Très légère	Acquisition 9 mai 1966	0 0 0
GOBY née Michelle LECAPITAINE 43 ans démonstratrice	3	Id.	Très légère		0 0 0
EPOUX LASKI				Demandes	0 0 0



NOM PRENOM	Dépréciation à revaloriser en fonction variation indice construction I.N.S.E.E. entre le 10 mars 1983 et ce jour sauf exceptions	Frais de déménagement	Gêne
Pierre BLERIOT	52 000 CINQUANTE DEUX MILLE CINQ CENTRS FRANCS	10 000 DIX MILLE FRANCS	25 000 VINGT CINQ MILLE FANCS
Ginette BLERIOT	0	0	30 000 TRENTE MILLE FRANCS
Antoine BOUDON	0	0	48 000 QUARANTE HUIT MILLE FRANCS
Jeanne BOUDON	32 000 TRENTE DEUX MILL FRANCS	7 000 SEPT MILLE FRANCS	40 000 CINQUANTE MILLE FRANCS
Marcel THILL	84 000 QUATRE VINGT QUATRE MILLE FRANCS	10 000 DIX MILLE FRANCS	50 000 CINQUANTE MILLE FRANCS
Micheline THILL	0	0	50 000 CINQUANTE MILLE FRANCS
Jean BRAY	60 000 SOIXANTE MILLE FRANCS	10 000 DIX MILLE FRANCS	35 000 TRENTE CINQ MILLE FRANCS
Suzanne BRAY	0	0	44 000 QUARANTE QUATRE MILLE MILLE FRANCS
Claude CHICOT	72 750 SOIXANTE DOUZE MILLE SEPT CENT CINQUANTE FRANCS	10 000 DIX MILLE FRANCS	40 000 QUARANTE MILLE FRANCS

**AUDIENCE DU 26 JUIN 1986 I<sup>o</sup> CHAMBRE  
I<sup>o</sup> SECTION N° 2 SUITE**

**AR CES MOTIFS**

LE TRIBUNAL,

Déclare chacune des Compagnies AIR FRANCE, U.T.A., AIR INTER, BRITISH AIRWAYS, T.W.A. responsable du dommage causé à chacun des demandeurs installé à Goussainville antérieurement au 1<sup>er</sup> juillet 1965, par le survol de chacun des avions leur appartenant;

Evalue le montant des indemnités compensatrices du préjudice subi par chacun des demandeurs du fait du trafic global aérien à l'aéroport de Roissy comme suit:

Rejette les demandes de Joseph CHAPALAIN, Jean GOBY, Michelle GOBY, les époux LASKI;

Fixe la part du préjudice subi parles demandeurs juridiquement réparable par l'ensemble des cinq compagnies défenderesses à 67% des sommes sus-indiquées;

Dans cette limite de 67% du montant des indemnités ci-dessus évaluées, condamne:

AIR FRANCE à en payer:	71,70%
U.T.A. à en payer:	6,15%
AIR INTER é en payer:	8,05%
BRITISH AIRWAYS à en payer:	6,05%
T.W.A. à en payer:	8,05%

Déboute les demandeurs du surplus de leurs demandes;

Ordonne l'exécution provisoires de la présente décision à concurrence de moitié des indemnités allouées à chaque demandeur.

Condamne chacune des Compagnies AIR FRANCE, U.T.A., AIR INTER, BRITISH AIRWAYS, T.W.A. à payer à chacun des allocataires d'indemnités la somme de QUATRE CENTS FRANCS (F. 400) en application de l'rticle 700 du Nouveau Code de procédure Civile;

Condamne les défenderesses en tous les dépens, y compris les frais d'expertise, dans la proportion de:

71,70% à charge d' AIR FRANCE,
6,15% à charge d'U.T.A.,
8,05% à charge d' AIR INTER,
6,05% à charge de BRITISH AIRWAYS
8,05% à CHARGE DE T.W.A.;

Dit que Maître Corinne LEPAGE-JESSUA, avocat, pourra recouvrer directement cotnre chacune des défenderesses dans la proportion cidessus indiquée, les dépens dont ellea fait l'avance sans avoir reçu provision, conformément aux dispositions de l'article 699 du Nouveau Code de Procédure Civile.

Fait et jugé à Paris, le 26, juin 1986

LE GREFFIER	le president
P. BAYARD	G. ANGIBAULT



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## PROTECTION DE LA NATURE

*Cueillette de Reines des Alpes. Espèce protégée. Arrêté du 20 janvier 1982. Infraction aux articles 3 et 32 de la loi du 10 juillet 1976. Rejet de l'exception d'illégalité fondée sur l'article 17 de la Déclaration des droits de l'homme et du citoyen.*

Action civile du parc national des Ecrines. Irrecevabilité. Absence de préjudice personnel et direct.

TRIBUNAL CORRECTIONNEL DE GAP, 12 octobre 1988

Ministère public c/ Alphand

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Le Tribunal,

Attendu que Alphanth Henri est prévenu d'avoir, à l'Argentière-la-Bessée (05), lieu-dit Les Desiloures, le 1<sup>er</sup> août 1987, cueilli des végétaux protégés appartenant à une espèce non cultivée (en l'espèce cueillette interdite de Reines des Alpes), fait prévu et réprimé par les articles 3 et 32 de la loi n° 76-692 du 10 juillet 1976, l'article premier du décret n° 77-1295 du 25 novembre 1977 et de l'arrêté interministériel du 20 janvier 1982;

Attendu que le prévenu ne conteste pas les faits; qu'il reconnaît avoir été trouvé porteur de 1 600 fleurs cueillies le 1<sup>er</sup> août 1987 vers 20 h 45 sur le territoire de la commune de l'Argentière-la-Bessée. Lesdotes fleurs étant des « Reines des Alpes »; que la Cueillette était destinée à alimenter le commerce de l'épouse de Henri Alphanth, fleuriste à Briançon;

### 1. Sur l'exception d'illégalité:

Attendu qu'Henri Alphanth soulève l'exception d'illégalité du texte répressif visé dans la citation au regard du droit de propriété consacré par la Déclaration des droits de l'homme et du citoyen dans son article 17; qu'il soutient, en effet, qu'ayant coupé des fleurs en partie sur les terrains privés, la loi ne peut, sauf indemnisation pour expropriation, porter atteinte aux droits du propriétaire; qu'ayant les autorisations tacites de ces derniers, il pouvait cueillir les fleurs sans enfreindre aucune loi;

Attendu cependant, qu'en l'espèce, le procès-verbal des gardes du parc national des Ecrins indique expressément que « les fleurs ont été cueillies pour la plus grande part sur les terrains domaniaux »; qu'en outre, Henri Alphanth, dans son audition du 16 septembre 1987, déclarait qu'il avait cueilli « en grande parties dans le domaine privé »; que dès lors il reconnaissait a contrario qu'il avait bien cueilli des fleurs protégées dans le domaine public, que l'exception est donc sans objet; qu'il convient d'entrer en voie de condamnation à son égard;

### 2. Sur l'action civile:

Attendu que le parc national des Ecrins se constitue partie civile et réclame la condamnation de Henri Alphanth à lui payer 5 000 F de dommages et intérêts, 2 500 F au titre de l'article 475-1 du Code de procédure pénale, et réclame la publication du jugement dans les journaux régionaux;

Attendu que le parc national des Ecrins est un établissement public national régi par la loi du 22 juillet 1960; qu'un territoire a été délimité par décret pour assurer la protection du milieu naturel contre tout effet de dégradation naturelle et toute intervention artificielle; que l'habilitation des gardes d'un parc national leur permet de constater des infractions aux lois et règlements applicables sur les territoires prélimités;

Attendu qu'en l'espèce, les gardes du parc national des Ecrins sont intervenus en dehors des limites de ce territoire; que si leurs constatations sont légalement valables, il apparaît néanmoins que la constitution de partie civile de l'établissement public n'est pas justifiée puisque les gardes participaient alors à une mission d'intérêt général; qu'en effet, s'il appartient à toute administration ou agent du service public habilité spécialement, de constater des infractions, le droit de poursuite n'appartient, sauf exceptions légales, qu'au procureur de la République; que si l'Etat, les administrations peuvent réclamer par la voie de l'action civile la réparation d'un préjudice causé directement par une infraction pénale (vol, dégradation,...), ces personnes morales de droit public ne peuvent solliciter la réparation d'un préjudice moral causé à leur autorité ou à leur prestige; qu'en conséquence, il apparaît que la constitution du parc national des Ecrins en l'espèce est irrecevable pour défaut d'intérêt en lien direct avec l'infraction reprochée à Henri Alphanth;

Attendu que les faits sont caractérisés, qu'il y a lieu d'entrer en voie de condamnation;

### PAR CES MOTIFS,

#### 1. Sur l'action publique:

Déclare Henri Alphanth coupable de l'infraction qui lui est reprochée et, faisant application des textes susvisés qui ont été énoncés à l'audience par M. le Président l'audience par M. le Président, le condamne à une amende de dix mille francs;

Le condamne en outre aux dépens avancés par l'Etat, liquidés à la somme de 344,85 F, représentant le montant du droit de poste, outre les coûts et accessoires du présent jugement;

#### 2. Sur l'action civile:

Déclare irrecevable la constitution de partie civile du parc national des Ecrins;

Le condamne en outre aux dépens de l'action civile.

Cueillette de Reines des Alpes. Espèce protégée. Infraction constituée. Condamnation confirmée.

Action civile du parc national des Ecrins. Recevabilité. Atteinte au patrimoine national constituant un préjudice certain et direct distinct de l'intérêt social.

### COUR D'APPEL DE GRENOBLE, 22 DÉCEMBRE 1988

La Cour,

Statuant sur les appels régulièrement interjetés par le prévenu Alphanth Henri et le Ministère public du jugement du 12 octobre 1988 du tribunal correctionnel de Gap, qui

a déclaré le prévenu coupable d'avoir, à l'Argentière-la-Bessée, le 1<sup>er</sup> août 1987, cueilli des végétaux protégés appartenant à une espèce non cultivée;

Attendu que le 1<sup>er</sup> août 1987, Fourrat, garde-moniteur du parc national des Ecrins, dressait procès-verbal à l'égard du prévenu pour avoir ramassé des Reines des Alpes (ou Panicaut ou Chardon Bleu) dans la zone péri-périphérique du parc, plus précisément 16 gerbes de 100 fleurs destinées à la vente dans le commerce tenu par son épouse à Briançon; que le garde précisait que la cueillette avait eu lieu « pour la plus grande part en terrains domaniaux »;

Attendu qu'Alphand déclarait, aux services de police à Briançon, qu'il avait procédé à la cueillette « en grande partie dans le domaine privé »; ce qui signifie, a *contrario*, qu'il a cueilli les fleurs en partie sur des terrains domaniaux »

Attendu que le prévenu soutient que l'application stricte de la loi de 1976 est « courtelinesque »; qu'il a été poursuivi en contravention à l'article 17 de la Déclaration des droits de l'homme et du citoyen qui protège la propriété privée et aux articles 544, 545, et 546 du Code civil; que l'arrêté du 20 janvier 1982 prévoit une exception pour les parcelles habituellement cultivées;

Mais attendu que la loi est générale; que son application érale; que son application à Alphand ne peut être qualifiée de courtelinesque, ce qui n'est d'ailleurs pas un moyen de droit;

Que l'article 544 a prévu qu'on ne doit pas faire un usage de la chose prohibée par les lois ou les règlements; qu'en ce qui concerne les moyens soulevés tenant à la propriété des terrains où la cueillette avait lieu, Alphand n'a jamais prouvé ni prétendu qu'il en était le propriétaire; que c'est à bon droit que le premier juge l'a retenu dans les liens de la prévention; que le jugement sera confirmé sur l'action publique;

#### Sur l'action civile:

Attendu que le prévenu soutient que la demande du parc en 5 000 F de dommages-intérêts n'est pas recevable au motif que l'incrimination a pour objet la protection de l'intérêt général; que le parc n'a pas subi de préjudice personnel; que la cueillette a été faite sur des terrains privés;

Attendu que l'infraction a été relevée dans la zone périphérique du parc et non exclusivement sur des propriétés privées; qu'en tout cas, les agents du parc national des Ecrins sont commissionnés par le ministre pour constater les infractions à la loi sur les départements

des Hautes-Alpes et de l'Isère; que, par son action civile, le parc national des Ecrins, établissement public, ne cherche pas à se substituer au Ministère public; que le parc national des Ecrins a l'obligation de surveillance et de mettre en oeuvre des moyens pour assurer la sauvegarde du patrimoine national dont les végétaux font partie; que, par l'atteinte au patrimoine national, du fait du comportement du prévenu, le parc national des Ecrins a subi un préjudice certain et direct; qu'il sera fait droit à sa demande en lui allouant une indemnité de 2 000 F compte tenu des éléments d'appréciation soumis à la Cour;

Attendu qu'il serait inéquitable de laisser à la charge de la partie civile la totalité des frais irrépétibles; qu'il convient de lui allouer 1 000 F au titre de l'article 475-1 du Code de procédure pénale;

#### PAR CES MOTIFS:

Reçoit les appels;  
Confirme le jugement sur l'action pénale;  
Réformant sur l'action civile;  
Dit le parc national des Ecrins recevable;

Condamne Alphand à payer au parc national des Ecrins une indemnité de 2 000 F à titre de dommages-intérêts, outre 1 000 F au titre de l'article 475-1 du Code de procédure pénale et aux dépens;

Dit que la contrainte par corps s'appliquera conformément aux articles 749 à 752 du Code de procédure pénale.

Pourvoi rejeté par la Cour de Cassation (Ch. Crim.) le 13 juin 1989 (n° 89 80090 D), les moyens invoqués remettant en cause l'appréciation souveraine des faits.

#### OBSERVATIONS

Il est rasissime que les prélèvements illicites de plantes protégées donnent lieu à des poursuites pénales (1). D'où l'intérêt des décisions rapportées, condamnant un instituteur qui pour alimenter le commerce de son épouse, avait cueilli, dans la zone périphérique du parc national des Ecrins, 1 600 Reines des Alpes (*Cryngium alpinum*), espèce protégée par l'arrêté du 20 janvier 1982.

La rélité du délit n'était pas discutables et l'on peut s'étonner des errements juridiques motivant la condamnation<sup>(1)</sup>. La recevabilité de l'action civile du parc national des Ecrins donna lieu à des solutions opposées; ces divergences illustrent, une fois de plus, les difficultés liées à cette question toujours renouvelée<sup>(2)</sup>.

(1) M.-J. Littmann-Marin, « Les dispositions pénales relatives à la flore et leurs difficultés d'application », in Plantes sauvages menacées de France. Bilan et protection, Actes du colloque de Brest, 8-10 octobre 1987, B.R.G., 1989, p. 243-258.

(2) Cette numérotation résulte d'une codification de divers textes dans le livre II du Code rural « Protection de la nature », J.O., 4 novembre 1989, annexe au no 257.

## I. — LE DÉLIT DE CUEILLETTE DE PLANTES PROTÉGÉES

L'occasion est opportune de rappeler les conditions de réalisation de ce délit (A) et l'organisation de sa répression (B).

### (A) La réalisation de l'infraction

Dans cette espèce, dégager les éléments constitutifs de l'infraction ne semblait pas présenter de difficultés, malgré certaines contradictions textuelles, non évoquées, d'ailleurs, par les décisions. Or, les motivations des juges du fond, pour rejeter les moyens de la défense fondés sur l'atteinte prétendue au droit de propriété, déroutent. Embrassées, peu pertinentes, elles omettent l'argument juridique décisif: l'inopposabilité du droit de propriété aux activités prohibées concernant les espèces protégées.

- a) *Les éléments constitutifs de l'infraction supposent une activité interdite dont l'objet est une espèce protégée.*

L'*Eryngium alpinum* figure dans l'annexe I de l'arrêté du 20 janvier 1982 lequel fixe, conformément à l'article 4 de la loi du 10 juillet 1976 relative à la protection de la nature (C. rur., art. L. 211-2) (2), et à l'article premier du décret n° 77-1295 du 25 novembre 1977 (c. rur., art. R. 211-1), la liste des espèces végétales protégées sur l'ensemble du territoire national.

Le prévenu, trouvé porteur de ces plantes, avait reconnu être l'auteur de leur cueillette. Le tribunal correctionnel de Gap, suivi par la cour d'appel de Grenoble, constate la transgression de l'article 3, alinéa 3 de la loi du 10 juillet 1976 (C. rur., art. L. 211-1-2°) qui interdit: « La destruction, la coupe, la mutilation, l'arrachage, la cueillette ou l'enlèvement de végétaux de ces espèces ou de leur fructification, leur transport, leur colportage, leur utilisation, leur mise en vente, leur vente ou leur achat ».

Ces comportements sont pénalement sanctionnés par l'article 32 de la loi de 1976 (C. rur., art. L. 215-1). Les composantes objectives du délit étaient prouvées.

On notera pourtant que l'article premier de l'arrêté du 20 janvier 1982 ne reprend pas toutes les interdictions fixées par le législateur, les limitant à la destruction, aux actes de commercialisation et à l'utilisation de tout ou partie des spécimens sauvages. La cueillette, notamment, n'est pas expressément prohibée<sup>(3)</sup>. Ces restrictions, conformes aux

prévisions du décret du 25 novembre 1977, sont contraires à la loi du 10 juillet 1976.

L'article premier du décret du 25 novembre 1977 prévoit que, pour chaque espèce, les arrêtés interministériels préciseront la nature des interdictions mentionnées à l'article 3 de la loi du 10 juillet 1976. Mais le législateur, s'agissant des prohibitions de l'article 3, qu'il a pénalement sanctionnées, n'a concédé à l'exécutif aucun pouvoir pour les modifier, *a fortiori*, pour les réduire. Sur ce point, les dispositions de l'article premier du décret du 25 novembre 1977, reprises à l'article R. 211-3-1° du Code rural, sont d'une légalité douteuse puisqu'elles autorisent la limitation, par arrêtés, des éléments constitutifs d'un délit, en l'absence de toute délégation législative prévoyant une telle intervention. C'est pourquoi le délit sera constitué dès lors que l'activité constatée est interdite par l'article 3 de la loi du 10 juillet 1976 (C. rur., art. L. 211-1-2°), peu importe qu'elle ne soit pas reprise par l'arrêté de protection.

Apparemment, cette difficulté, qui mériterait des commentaires plus nourris, n'a pas été soumise à la sagacité des juges du fond car le prévenu a situé le débat sur un autre terrain: celui de l'atteinte portée au droit de propriété.

- b) *Pour la première fois, croyons-nous, des juridictions répressives étaient invitées à préciser les prérogatives du droit de propriété sur des espèces végétales protégées.*

Certes, les arguments de la défense étaient fragiles en fait, mal explicités en droit. Qualifiée de « courtelinesque », l'affaire n'avait été prise au sérieux ni par le prévenu, ni par son défenseur. Ces carences ne dispensaient pas les magistrats d'adopter des motifs solides et pertinents pour écarter une défense maladroite, mais dont certains arguments méritaient réflexion.

Ainsi, l'exception d'illégalité de la loi du 10 juillet 1976, jugée par le prévenu contraire à l'article 17 de la Déclaration des droits de l'homme et du citoyen, et donc inopposable aux propriétaires de terrains privés expropriés sans indemnisation<sup>(4)</sup>, soulevait, en réalité, une exception d'inconstitutionnalité. La solution en est connue: « Survivance de sa splendeur d'antan, la loi, une fois promulguée est inattaquable »<sup>(5)</sup> « il n'appartient pas aux tribunaux de vérifier la constitutionnalité interne des lois »<sup>(6)</sup>. Sans faire aucune allusion à ce motif de rejet, le tribunal correctionnel écarte l'exception, fondant sa décision sur un argument qui n'emporte pas la conviction.

(3) Jean-Philippe Turlot, « Commentaire de l'arrêté du 20 janvier 1982 fixant la liste des espèces végétales protégées sur l'ensemble du territoire national », R.J.E., 1983, p. 8.

(4) « La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité, »

(5) W. Jeandidier, *Droit pénal général*, Montchrestien, 1988, p. 79, no 95.

(6) M. Puech, *Droit pénal général*, Litec, 1988, p. 81, no 225.

Le prévenu soutenait, en relation avec l'exception d'illégalité, que la loi de 1976 ne s'appliquant pas aux propriétaires privés, il pouvait justement se prévaloir de leur autorisation tacite et prélever licitement des plantes protégées poussant sur ces terrains. Le tribunal correctionnel ne répond pas directement à l'argumentation. Il constate sobrement que la cueillette a aussi été effectuée sur le domaine public, que l'exception est donc sans objet. Il évite ainsi de trancher une question fondamentale: le propriétaire du sol, propriétaire par droit d'accession des fruits naturels qui s'y trouvent (art. 552 du Code civil), peut-il disposer librement de plantes protégées au titre de la loi du 10 juillet 1976 et de la réglementation prise pour son application, les cueillir, en faire commerce, autoriser des tiers à les prélever, les commercialiser<sup>(7)</sup>?

L'ambiguïté de la solution des premiers juges est entretenue par les motivations de la cour d'appel qui approuve la condamnation du prévenu car « il n'a jamais prouvé ni prétendu qu'il était propriétaire des terrains où la cueillette avait eu lieu ». Doit-on penser que dans l'hypothèse contraire, son comportement aurait été jugé licite? L'arrêt semble le suggérer. Il esquive ainsi toute prise de position claire sur l'application du principe selon lequel les dispositions de la loi « nature » s'imposant aux propriétaires des plantes comme à quiconque, l'exercice du droit de propriété leur serait inopposable.

Observons que l'adoption d'une solution contraire réduirait à néant l'efficacité des mesures juridiques de sauvegarde prises dans un intérêt général qui devrait l'emporter sur l'intérêt privé, intérêt scientifique particulier, préservation du patrimoine biologique national (C. rur., art. L. 211-1, al. 1), respect des conventions internationales et des règles communautaires (8). Il faut donc concevoir que le propriétaire de plantes protégées perd le droit d'en disposer, sauf autorisation spéciale. On comprend mal qu'une telle constatation ait pu embarrasser, à ce point, les juridictions répressives, tant il est fréquent que « le droit d'user, de jouir de la chose soit affecté par les règles qui interdisent certaines affectations, restreignent le droit de planter, de construire ou de détruire, limitent le droit de disposer ou de ne pas disposer »<sup>(9)</sup>.

En revanche, on aurait admis que la cour d'appel hésitât sur la portée des exclusions territoriales concernant les interdictions énoncées par l'arrêt du 20 janvier 1982, exclusion invoquée furtivement par la défense et qui visent

« des parcelles habituellement cultivées ». « Celles-ci seraient exclues du champ d'application de l'arrêt »<sup>(10)</sup>.

Cette limitation territoriale a été décidée conformément aux dispositions du décret du 25 novembre 1977 pris pour l'application de l'article 4 de la loi du 10 juillet 1976 (C. rur., L. 211-2-3<sup>o</sup>). Compromis entre les nécessités d'une protection intégrale de certains végétaux et les exigences du monde agricole, la formulation utilisée pour l'exprimer est particulièrement malencontreuse. Les rares commentateurs qui ont tenté d'en percer le sens estiment que « tout ou partie des interdictions sont levées lorsqu'il s'agit d'opérations d'exploitation courante sur des parcelles habituellement cultivées »<sup>(11)</sup>. Doit-on comprendre que les prélèvements sur ces parcelles, la commercialisation de ces spécimens protégés deviennent licites?

Une telle interprétation, qu'autorise la lettre du texte, transformerait, n'en doutons pas, la protection des plantes rares en mystification symbolique. Compte tenu du nombre des parcelles habituellement cultivées sur le territoire français, les dérogations seraient la règle, la préservation l'exception.

L'esprit du texte serait, paraît-il, différent. Cette restriction territoriale aurait seulement pour objectif de ne pas entraîner « l'arrêt d'une activité agricole préexistante »<sup>(12)</sup>. L'exclusion permettrait de ne pas sanctionner l'exploitant qui maintient des pratiques agricoles nuisibles à la survie de certaines espèces protégées. L'arrêt de biotope serait alors sa contrepartie indispensable puisqu'il permet de réduire, voire d'interdire, la poursuite d'activités culturelles destructrices de milieux abritant des espèces protégées<sup>(13)</sup>.

Adhérer à ces analyses qui réduisent les méfaits de l'exclusion signalée est tentant car rassurant. Il n'empêche que la limitation territoriale relative aux parcelles habituellement cultivées reste doublement impécise, dans sa notion comme dans ses effets. Cette rédaction approximative et équivoque est la cause de ces incertitudes. Qu'un représentant de la Direction de la protection de la nature délire « l'ambiguïté de ces expressions et le manque de jurisprudence qui pourrait aider (ses services) à les interpréter »<sup>(14)</sup> est pour le moins paradoxal. Des magistrats dépourvus d'humour pourraient ne pas apprécier ce curieux renversement des rôles.

(7) Sur l'appropriation des végétaux et les conséquences pénales qui en découlent, V.M.-J. Littmann-Martin, le Droit pénal, in « L'écologie et la loi, le statut juridique de l'environnement », Ouv. Coll., direct. A. Kiss, l'Harmattan, 1989, p. 106 et s.

(9) F. Terré, « L'évolution du droit de propriété depuis le Code civil », Droits, Revue française de théorie juridique, no 1, p. 39.

(10) J.-Ph. Turlot, op. Cit.

(11) J.-P. Galland, « Les instruments juridiques de protection de la flore sauvage en France », Actes du colloque de Brest, préc., p. 236; J.-Ph. Turlot, op. Cit.

(12) J.-P. Galland, op. Cit. Loc. Cit.

(13) En ce sens, J.-Ph. Turlot, J.-P. Galland, op. Cit.

(14) J.-P. Galland, op. Cit. P. 236.



Malheureusement, l'espèce rapportée ne contribuera pas à élucider cette question. La cour d'appel a choisi de l'ignorer. Apparemment non évoquée dans les moyens du pourvoi en cassation ou mal exprimée, elle vient s'ajouter à d'autres énigmes du droit de l'environnement.

## (B) La répression

Eelle ne présente pas de difficultés notables, d'où la brièveté des observations la concernant.

L'infraction avait été constatée par un garde du parc national des Ecrins, agissant en zone périphérique. L'article 29 de la loi du 10 juillet 1976 (C. rur. Art. L. 215-5-4<sup>o</sup>) habilite les agents assermentés et commissionnés des parcs nationaux à constater les infractions à cette loi. Les agents du parc national des Ecrins étant commissionnés pour cette mission dans les départements des Hautes-Alpes et de l'Isère, c'est très régulièrement que le procès-verbal de cueillette de plante protégée avait été établi. Dommage que la cour d'appel n'explique pas pourquoi il est important, à ses yeux, que l'infraction n'ait par été relevée exclusivement sur des propriétés privées.

Les peines principales encourues par le prévenu, prévues par l'article 32 de la loi du 10 juillet 1976 (C. rur. Art. L. 215-1), sont une amende de 2 000 à 60 000 F et/ou un emprisonnement d'une durée maximale de six mois (sanction ajoutée à l'art. 32 par la loi n° 87-502 du 8 juillet 1987). Le tribunal correctionnel jugea suffisante une amende de 10 000 F, condamnation confirmée en appel.

On ignore le sort de ces 1 600 Reines des Alpes. Ont-elles été saisies par l'agent verbalisateur conformément aux dispositions de l'article 32 de la loi de 1976 (C. rur. Art. L. 215-4)? Ont-elles été laissées à la disposition du coupable? Selon que l'on retient la première ou la seconde hypothèse, la rigueur de la sanction varie, passant du raisonnable à l'indulgence.

Soulignons que la cueillette de seize gerbes de cent fleurs a été considérée codélictueuse unique entraînant une seule qualification pénale. On notera aussi l'absence de peine ou mesure complémentaires. Sur ce point, la loi du 10 juillet 1976 est d'une grande indigence élémentaires. Sur ce point, la loi du 10 juillet 1976 est d'une grande indigence à laquelle n'a pas remédié la loi du 8 juillet 1987. La codification récente y a ajouté l'incohérence. En effet, l'article L. 215-3 du Code rural prévoit, pour les infractions de l'article L. 211-1 (art.3 de la loi de 1976), les sanctions des articles L. 228-8 et L. 228-11 du Code rural. Or, ces textes ne reprennent en rien les dispositions des alinéas premier et quatrième de l'article 379 (ancien) du Code rural

auxquelles renvoyait l'article 32 in fine de la loi « nature ». Le droit pénal de l'environnement est en soi suffisamment compliqué sans que de telles erreurs viennent ajouter à la confusion.

## II. – L'ACTION CIVILE DU PARC NATIONAL DES ÉCRINS

Le parc national des Ecrins, en qualité de partie civile, réclamait 5 000 F de dommages et intérêts, la publication de la décision de condamnation dans des journaux régionaux, et 2 500 F au titre de l'article 475-1 du code de procédure pénale.

Le tribunal correctionnel de Gap conclut à l'irrecevabilité de cette action civile (A), décision infirmée par la cour d'appel de Grenoble (B).

### A) La position des premiers juges est d'un grand classicisme dès lors que l'on reconstitue les motifs un peu elliptiques qui la justifie

Le parc national des Ecrins, établissement public national à caractère administratif, n'avait pas précisé la nature du préjudice dont il demandait réparation. Implicitement, le tribunal correctionnel écarte le préjudice matériel, l'infraction ayant été commise dans la zone périphérique et non à l'intérieur du parc. Le préjudice était donc moral. La Cour de cassation considère que le dommage moral invoqué par une personne morale de droit public se confond avec l'intérêt social que représente le Ministère public. Ce préjudice n'est donc pas personnel. Les conditions de l'article 2 du Code de procédure pénale ne sont pas remplies. L'action civile est irrecevable (15). Ainsi, fut censuré un arrêt qui, pour accorder des dommages et intérêts à des communes riveraines d'un cours d'eau pollué par des rejets industriels, avait retenu, notamment, un préjudice moral résultant de « l'atteinte aux beautés naturelles »<sup>(16)</sup>.

Le tribunal correctionnel se fonde donc sur cette jurisprudence constante pour conclure à l'irrecevabilité de l'action civile du parc national des Ecrins.

Une solution contraire supposerait une habilitation législative spécifique dispensant la personne morale de satisfaire aux exigences de l'article 2 du Code de procédure pénale. Citons, à titre d'exemple, l'Agence nationale pour la récupération et l'élimination des déchets (A.N.R.E.D.) qui, aux termes de l'article 26 de la loi du 15 juillet 1975 relative à l'élimination des déchets et à la récupération des matériaux, peut exercer les droits reconnus à la partie civile en ce qui concerne les faits constituant un préjudice direct ou indirect aux intérêts qu'elle a pour objet de défendre.

(16) Cass. Crim, 13 novembre 1979, Bull., n° 316; R.J.E., 1982, p. 168, note M.-J. Littmann-Martin.

Faute d'une disposition similaire en faveur des parcs nationaux, ceux-ci ne peuvent prétendre qu'à la réparation d'un préjudice matériel certain, personnel et en relation directe avec l'infraction constatée. Le rejet de l'action civile du parc national des Ecrins ne saurait surprendre, conforme au souci justifié de respecter le monopole du Ministère public en matière de poursuite.

**B) Pourtant, la cour d'appel réforme sur ce point la décision des premiers juges, et accueille l'action civile du parc national. Sa démarche est particulièrement novatrice**

Soulignant la mission spécifique des parcs nationaux, mission qui implique une obligation de surveillance, de mise en oeuvre des moyens assurant la sauvegarde du patrimoine national dont les végétaux font partie, elle affirme que la cueillette de plantes protégées cause au parc national des Ecrins un préjudice certain et direct.

Elle prend ainsi en compte ses efforts personnels et malaisés pour soustraire au vandalisme ou à la cupidité de quelques individus sans scrupules certaines des plus belles stations de Reines des Alpes et de Dracocéphales d'Autriche menacées de disparition. A cette fin, une politique d'inventaires de la flore remarquable a été menée en zone centrale et en zone périphérique. Un programme de gestion du patrimoine floristique de la région a été arrêté avec les conservatoires botaniques de Porquerolles et de Gap-Charance. Exposant ces actions de protection, M. Dalmas, conseiller scientifique du parc national des Ecrins, avait déploré l'impuissance des parcs nationaux « face à la destruction des habitats, à l'extinction des stations en zone périphérique », et espéré que des arrêtés de biotopes, alors en cours d'instruction, viendraient protéger, notamment, certaines stations de Reines des Alpes <sup>(17)</sup>.

La décision de la cour d'appel vient à point pour renforcer l'efficacité de ces mesures, puisque l'intérêt à agir devant les juridictions répressives est reconnu dès lors que l'infraction poursuivie porte atteinte au patrimoine national que les parcs nationaux se doivent de défendre.

On mesure la portée d'une telle décision. Fort de ce précédent, un parc national pourra, par le biais de l'action civile, saisir un juge d'instruction, un tribunal correctionnel, palliant ainsi l'intertie fréquente de certains parquets peu sensibles à cette forme de délinquance.

S'il n'est pas rare que les juridictions pénales caractérisent de préjudice personnel et direct l'atteinte portée aux objectifs associatifs pour accueillir l'action civile d'associations à but désintéressé<sup>(18)</sup>, il semble tout à fait exceptionnel qu'une personne morale publique bénéficie d'une telle analyse. L'innovation est donc remarquable.

On regrettera, néanmoins, la modicité des dommages et intérêts accordés et le fait que la cour d'appel n'ait pas ordonné, à titre de réparation, la publication de la décision de condamnation. On regrettera surtout que la finalité de la loi du 10 juillet 1976, la sauvegarde du patrimoine national, si nettement dégagée pour fonder la recevabilité de l'action civile du parc national des Ecrins, ait été occultée dans la détermination des éléments constitutifs de l'infraction, lorsqu'il convenait de préciser les prérogatives des propriétaires sur des végétaux protégés. L'attachement aux valeurs traditionnelles ne doit pas retarder l'adoption de nouvelles valeurs sociales. Savoir les reconnaître est un premier pas que les décisions commentées n'ont pas osé franchir. Fâcheuse occasion perdue.

M.-J. LITTMANN-MARTIN,  
Professeur à l'université  
Robert-Schuman de Strasbourg.

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(17) J.-P. Dalmas, « Les actions de protection de la flore dans les parcs nationaux », Actes du colloque de Brest, op. Cit., p. 282, 284.

(18) En ce sens, Colmar, 10 février 1977, D. 1977, 471, note D. Mayer. Ajouter par exemple, J. Pradel, « Procédure pénale », op. Cit., p. 216, no 223 et les références citées.



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**JURISPRUDENCE**

**POLLUTION DES EAUX**

Responsabilité de la puissance publique. Commune.

Pollution de rivière. Déversement d'un ruisseau aménagé en égoût.

Fédération départementale de pêche. Société de pêche. Titulaire du droit de pêche. Justification du préjudice. Frais de réempoisonnement.

CONSEIL D'ÉTAT – 10 décembre 1975

Fédération départementale des associations de pêche et de pisciculture  
d'Eure-et-Loire, Société de pêche « Les pêcheurs rémois » et sieur Dega  
(Req. n° 91 310, 91 372 et 91 461)

MM. Ourabah, rapp., Franc, c. du g., M<sup>e</sup> Ryziger, M<sup>e</sup> Boulloche  
M<sup>e</sup> Lesourd et M<sup>e</sup> Giffard, av.

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Considérant que les requêtes susvisées sont dirigées contre le même jugement du Tribunal administratif d'Orléans en date du 23 mars 1973; qu'il y a lieu de les joindre pour y être statué par une seule décision;

Considérant qu'il n'est pas contesté que les rivières « L'Avre » et « La Flotte » ont été polluées les 3 septembre 1968 et 16 juin 1972 par le déversement des eaux provenant du « ruisseau des Avres » aménagé par la commune de Saint-Lubin-des-Joncherets (Eure-et-Loir) en égoût pour desservir le lotissement industriel de cette commune; que la Fédération départementale des associations de pêche et de pisciculture d'Eure-et-Loir, la société de pêche « Les pêcheurs rémois » et le sieur Dega ont demandé à être indemnisés par la commune du préjudice qu'ils prétendent avoir subi du fait de la pollution;

*En ce qui concerne la requête de la Fédération départementale des associations de pêche et de pisciculture d'Eure-et-Loir;*

Considérant qu'en vertu des dispositions de l'article 3 du décret du 11 avril 1958 portant règlement d'administration publique pour l'application des articles 402 et 500 du code rural, la Fédération requérante, qui doit assurer la protection et la reproduction du poisson d'eau douce, ne peut éventuellement prétendre qu'à la réparation des dommages relatifs aux frais de réempoissonnement des cours d'eau pollués;

Considérant qu'il ne résulte pas de l'instruction que la Fédération requérante ait procédé, postérieurement au 3 septembre 1968, à des dépenses de réempoissonnement supérieures à celles qu'elle avait effectuées, à ce titre, au cours des années antérieures à pollution; qu'ainsi elle ne justifie pas avoir subi un préjudice de nature à lui ouvrir droit à indemnité;

Considérant que si la Fédération départementale des associations de pêche et de pisciculture d'Eure-et-Loir fait état du préjudice résultant pour elle de la nécessité d'exposer, à l'avenir, des frais pour réempoissonner l'Avre, ce préjudice qui présente un caractère purement éventuel ne saurait donner droit à réparation; que, sans qu'il soit besoin d'ordonner une expertise, la Fédération n'est, par suite, pas fondée à soutenir que c'est à tort que, par le jugement attaqué, le Tribunal administratif d'Orléans a rejeté sa demande d'indemnité.

*En ce qui concerne la requête du sieur Dega*

Considérant que le sieur Dega, propriétaire et locataire du droit de pêche sur l'Avre, n'apporte pas la preuve qu'il ait procédé à un réempoissonnement exceptionnel à la suite de la mortalité de poissons due à la pollution du 3 septembre 1968 et à celle du 16 juin 1972; que s'il a produit des factures concernant l'achat de truites et truitelles en 1967, 1968, 1969, 1970 et 1972 des factures concernant l'achat d'aliments pour le poisson en 1970, 1971 et 1972, il ne

justifie pas que ces achats correspondent à des charges financières supplémentaires imposées par la pollution incriminée; que, dès lors, c'est à bon droit que le jugement attaqué, lequel n'est pas entaché de contradiction, a rejeté la demande d'indemnité au sieur Dega;

Considérant qu'il résulte de tout ce qui précède, et sans qu'il soit besoin d'ordonner une nouvelle mesure d'instruction, que le sieur Dega n'est pas fondé à demander l'annulation du jugement attaqué par lequel le Tribunal administratif d'Orléans lui a dénié à indemnité;

*En ce qui concerne la requête de la Société « Les pêcheurs rémois »:*

Considérant qu'il résulte de l'instruction que la Société de pêche « Les pêcheurs rémois », titulaire des droits de pêche sur l'Avre a procédé à des réempoissonnements exceptionnels destinés à remédier aux destructions de poissons consécutives à la pollution de ses lots de pêche; qu'en revanche elle ne justifie pas avoir perdu des adhérents de 1968 à 1972; qu'il sera fait une exacte appréciation du préjudice subi par ladite société du fait de la pollution en condamnant la commune de Saint-Lubin-des-Joncherets à lui verser une indemnité de 10 000 F; que, dès lors, elle est fondée à soutenir que c'est à tort que, par le jugement attaqué, le Tribunal administratif a rejeté sa demande d'indemnité;

*Sur les intérêts:*

Considérant que la somme susindiquée de 10 000 F doit porter intérêts au taux légal à compter du 5 décembre 1972, date de la requête introductive d'instance devant le Tribunal administratif d'Orléans de la société de pêche « Les pêcheurs rémois »;

*Sur les intérêts:*

Considérant que la Société de pêche « Les pêcheurs rémois » a demandé la capitalisation des intérêts le 29 janvier 1975; qu'à cette date, il était dû au moins une année d'intérêts; qu'il y a lieu, conformément à l'article 1154 du code civil, de faire droit à ladite demande;

*Sur les dépens de première instance:*

Considérant que dans les circonstances de l'affaire il y a lieu de mettre les dépens de première instance afférents à la requête de la Société de pêche « Les pêcheurs rémois » à la charge de la commune de Saint-Lubin-des-Joncherets;

#### **DECIDE:**

Article premier. — Le jugement susvisé du Tribunal administratif d'Orléans en date du 23 mars 1973 est annulé en tant qu'il a statué sur la requête de la Société de pêche « Les pêcheurs rémois ».

Art. 2. – La commune de Saint-Lubin-des-Joncherets est condamnée à verser à la Société de pêche « Les pêcheurs rémois », une indemnité de 10 000 F. Cette somme portera intérêts au taux légal à compter du 5 décembre 1972; les intérêts échus le 29 janvier 1975 seront capitalisés à cette date pour produire eux-mêmes intérêts.

Art. 3. – Le surplus des conclusions de la requête de la Société de pêche « Les pêcheurs rémois », la requête de la Fédération départementale des associations de pêche et de pisciculture d'Eure-et-Loir et la requête du sieur Dega sont rejetés.

Artl. 4. – Les dépens de première instance afférents à la requête de la Société de pêche « Les pêcheurs rémois » sont mis à la charge de la commune de Saint-Lubin-des-Joncherets.

Art. 5. – La commune de Saint-Lubin-des-Joncherets supportera les dépens exposés devant le Conseil d'Etat et afférents à la requête n° 91 372; la Fédération départementale des associations de pêche supportera les dépens afférents à la requête n°91 310 et le sieur Dega les dépens afférents à la requête n° 91 461.

## URBANISME

Zone d'aménagement différé. Complexe pétrolier.

Procédure. Autorité compétente. Délimitation du périmètre de la zone.

Compatibilité d'une Z.A.D. avec un site classé/

CONSEIL D'ÉTAT, ASSEMBLÉE – 17 octobre 1975  
Sieur Gueguen et autres (Req. n° 94 262)

M. François Lagrange, rapp., M. Labetoulle, c. du g.,  
M<sup>e</sup> Vidart, av.

Considérant qu'aux termes de l'article 7 de la loi n° 62-848 du 26 juillet, 1962, modifiée par la loi n°71-581 du 16

juillet 1971 « peuvent être créées, par décision administrative sur proposition ou après consultation des communes ou groupements de communes intéressés, des zones d'aménagement différé en vue notamment de la création ou de la rénovation de secteurs urbains, de la création de zones d'activité ou de la constitution des réserves foncières prévues à l'article 11 de la loi d'orientation foncière du 30 décembre 1967 « qu'aux termes de l'article 13-1 du décret n° 72-550 du 23 juin 1972 sont considérés comme groupements de communes intéressées au sens de l'article 7 de la loi susvisée du 26 juillet 1962 les établissements publics ayant compétence en matière d'urbanisme groupant les communes intéressées. Les zones d'aménagement différé sont créées: 1° par arrêté du préfet sur proposition ou sur avis favorables des communes ou groupements de communes intéressées; 2° par arrêté du Ministre de l'équipement et du logement si le titulaire du droit de préemption est l'Etat ou un établissement public visé au 5° ou au 6° de l'article 13-cidessus ou si la zone est située sur le territoire de plusieurs départements; 3° par décret en Conseil d'Etat dans tous les cas d'avis défavorable d'une commune ou d'un groupement de communes intéressées...;

Considérant qu'il est constant que l'arrêté attaqué du préfet du Finistère du 8 septembre 1972, créant la zone d'aménagement différé de Lanvian sur le territoire des communes de Saint-Divy, Guipavas et Kersaint-Plabennec a été pris sur avis favorable de la commune de Kersaint-Plabennec et du syndicat mixte pour la création et l'aménagement des zones industrielles et maritimes dans la région de Brest dont les communes de Guipavas et Saint-Divy font partie; que ledit syndicat a été spécialement constitué pour acquérir et aménager les terrains en vue de l'implantation d'industries et de leur rétrocession en particulier pour la création d'un complexe pétrolier dans l'agglomération brestoise; qu'à cet effet il a légalement reçu des communes membres des compétences en matière d'urbanisme; que dans ces conditions les requérants ne sont pas fondés à soutenir que l'arrêté attaqué a été pris par une autorité incompétente.



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**CARRIERES – ÉTUDE D'IMPACT**

Autorisation d'exploitation de graves dans le lit de la Garonne. Frayères d'a'aloses et d'esturgeons situées en amont. Etude d'impact ne comportant aucune étude hydrobiologique. Annulation de l'arrêté préfectoral confirmée.

CONSEIL D'ETAT, 9 décembre 1988  
Entreprise de dragage et de travaux publics  
Et Société d'exploitation de la Garonne (Req. n° 76-493)

MM. Arnoult, rapp., Guillaume, c. du g., S.C.P., Lesourd, Baudin, av.

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Vu la requête le 12 mars 1986 au secrétariat du contentieux du conseil du Conseil d'Etat, présentée par l'Entreprise de dragage et de travaux publics (E.D.T.P.), et par la Société d'exploitation de la Garonne (S.E.G.), tendant à ce que le Conseil d'Etat annule le jugement en date du 16 janvier 1986 par lequel le tribunal administratif de Bordeaux a annulé un arrêté du commissaire de la République de la Gironde en date du 17 avril 1985 les autorisant à exploiter conjointement une carrière dans le lit de la Garonne;

Considérant qu'aux termes de l'article 2 du décret du 12 octobre 1977: « le contenu de l'étude d'impact doit être en relation avec l'importance des travaux et aménagements projetés et avec leurs incidences prévisibles sur l'environnement. L'étude d'impact présente successivement: 1° Une analyse de l'état initial du site et de son environnement, portant notamment sur les richesses naturelles et les espaces naturels agricoles, forestiers maritimes ou de loisirs, affectés par les aménagements ou ouvrages; 2° Une analyse des effets sur l'environnement, et en particulier sur les sites et paysages, la faune et la flore, les milieux naturels et les équilibres biologiques et, le cas échéant, sur la commodité du voisinage (bruits, vibrations, odeurs, émissions lumineuses), ou sur l'hygiène et la salubrité publique; 3° Les raisons pour lesquelles, notamment du point de vue des préoccupations d'environnement, parmi les parties envisagés, le projet présenté a été retenu; 4° Les mesures envisagées par le maître de l'ouvrage ou le pétitionnaire pour supprimer, réduire et, si possible, compenser les conséquences dommageables du projet sur l'environnement, ainsi que l'estimation des dépenses correspondantes....»;

Considérant qu'il ressort des pièces du dossier que l'autorisation donnée à l'Entreprise de dragage et de travaux publics et à la Société d'exploitation de la Garonne d'exploiter une carrière de graves dans le lit de la Garonne, à la hauteur de La Réole, nécessitait une étude hydrobiologique préalable, en raison de la présence, en

amont du lieu d'extraction, de l'une des rares frayères d'aloses et d'esturgeons d'Europe; qu'il est constant que l'étude d'impact réalisée par le centre d'études techniques de l'équipement, avec la collaboration du laboratoire régional de Bordeaux, n'incluait, de son propre aveu, les résultats d'aucune recherche hydrobiologique; que si quelques éléments d'information ont été fournis en la matière par une note, en date du 15 mars 1985, du laboratoire régional de Bordeaux, cette note a été établie postérieurement à l'enquête publique; que si l'arrêté d'autorisation du commissaire de la République du département de la Gironde, en date du 17 avril 1985, prescrit qu'avant tout début des travaux, une reconnaissance hydrobiologique sera effectuée sur les frayères, cette prescription, qui souligne d'ailleurs les lacunes de l'étude d'impact, ne saurait avoir pour effet de les rendre sans portée; qu'ainsi, l'Entreprise de dragage et de travaux publics et la Société d'exploitation de la Garonne, d'une part, le ministre du Redéploiement industriel et du Commerce extérieur, d'autre part, ne sont pas fondés à soutenir que c'est à tort que, par le jugement attaqué, le tribunal administratif de Bordeaux a annulé l'arrêté du 17 avril 1985 du préfet, commissaire de la République du département de la Gironde;

#### **DÉCIDE:**

**Article premier** – Le recours du ministre du Redéploiement industriel et du Commerce extérieur et la requête de l'Entreprise de dragage et de travaux publics et de la Société d'exploitation de la Garonne sont rejetés.

**Art. 2** - La présente décision sera notifiée à l'Entreprise de dragage et de travaux publics, à la Société d'exploitation de la Garonne, à M. Téthéraud, à la Fédération départementale d'association de pêche et de pisciculture, au ministre de l'Industrie et de l'Aménagement du territoire et au secrétaire d'Etat auprès du Premier ministre, chargé de l'Environnement.

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**JURISPRUDENCE**

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**DECIDE:**

Article 1<sup>er</sup>: Le jugement du tribunal administratif d'Orléans en date du 13 avril 1979 est annulé.

Article 2: Les conclusions présentées devant le tribunal administratif par l'Association pour la Qualité de la Vie du Val-de-Loire, la commune de Boulleret et M. Vacher-Devernaï, et tendant à ce qu'il soit sursis à l'exécution de l'arrêté du préfet du Cher en date du 5 janvier 1979 sont rejetées.

N.D.R. Les travaux de construction de la centrale de Belleville-sur-Loire n'avaient été nullement interrompus à la suite du sursis à exécution ordonné par le tribunal administratif d'Orléans. Le préfet du Cher et le Ministère de l'environnement ayant fait appel, le président du contentieux, usant de son pouvoir discrétionnaire, annula provisoirement dès le 10 mai, le jugement d'Orléans (voir *Le Monde*, 1<sup>er</sup> décembre 1979).

**INSTALLATIONS CLASSEES**

Installation fonctionnant sans respecter les dispositions de l'arrêté d'autorisation. Exercice sans permis d'activités non susceptibles d'être autorisées. Mises en demeure répétées de l'administration préfectorale.

Obligation pour le préfet de prendre des mesures adéquates. Choix des moyens (loi de 1917, article 4, 35 et 36).

Responsabilité de l'Etat du fait des dommages causés au voisinage. Faute de l'Administration qui n'a pas respecté son obligation d'assurer le respect de la législation en vigueur.

**CONSEIL D'ÉTAT, 22 MARS 1978**

Secrétaire d'Etat auprès du ministre de la Qualité de la vie (environnement) c. sieur Brelivet et autres (req. 4505) <sup>(1)</sup>

MM. Teissier du Cros, rapp.; Franc, c. du g., Lesourd, av.

Vu le redours présenté pour le secrétaire d'Etat auprès du ministre de la Qualité de la Vie (environnement) ledit recours enregistré au secrétaire du contentieux du Conseil d'Etat le 3 septembre 1976 et tendant à ce qu'il plaise au Conseil annuler le jugement en date du 30 juin 1976 par lequel le tribunal administratif de Rennes a déclaré l'Etat responsable des dommages résultant pour le sieur Brelivet et treize autres demandeurs du fonctionnement irrégulier de l'établissement de la société « Les fonderies armoricaines » dans la commune du Faou;

Vu la loi du 19 décembre 1917 modifiée par la loi du 2 août 1961;

Vu l'ordonnance du 31 juillet 1945 et le décret du 30 septembre 1953;

Vu la loi du 30 décembre 1977;

Considérant qu'aux termes de l'article 4 de la loi du 19 décembre 1917, « les établissements rangés dans la première ou la deuxième classe ne peuvent être ouverts sans une autorisation délivrée par le préfet sur la demande des intéressés; qu'il résulte des dispositions combinées la loi du 2 août 1961 et qui étaient en vigueur pendant toute la durée du fonctionnement de l'exploitation litigieuse, qu'il appartient au préfet, indépendamment des poursuites pénales, de mettre en demeure 'industriel intéressé de cesser son exploitation si celui-ci exerce sans autorisation une activité rangée dans la première ou la deuxième classe ou de se mettre en conformité avec les prescriptions de l'arrêté d'autorisation s'il méconnaît ces prescriptions; que l'industriel ne se conforme pas à la mise scellée sur l'établissement et, dans le second, d'ordonner l'exécution d'office des mesures prescrites ou la suspension provisoire du fonctionnement de l'établissement;

Considérant que si le préfet, qui conserve le choix des moyens à employer pour assurer l'exécution de la loi, est tenu, en l'absence de circonstances exceptionnelles, de prendre les mesures adéquates pour mettre fin à une situation irrégulière, en particulier dans le cas où l'autorisation qui aurait dû être demandée ne serait pas susceptible d'être légalement accordée;

Considérant qu'il est constant que l'établissement exploité au Faou (Finistère), successivement, par le sieur Vachet et par la société « Les fonderies armoricaines » n'avait reçu d'autorisation que pour l'activité de « fonderie de suifs de boucherie à l'état frais »; qu'il résulte de l'instruction que cet établissement a fonctionné, à tout le moins de 1956 à 1965, sans respecter les dispositions qui lui avaient été imposées, notamment en ce qui concerne les eaux résiduaires; qu'en outre, des activités non autorisées, dont certaines n'étaient pas légalement susceptibles de l'être en raison de leur appartenance à la première classe et de la proximité d'habitations, ont été pratiquées dans cet établissement, soit pendant toute la durée de l'exploitation, soit pendant certaines périodes au cours des années 1970 à 1975; que, si le préfet du Finistère a adressé à l'exploitant plusieurs mises en demeure dont certaines ont abouti à une amélioration de la situation, la persistance, pendant une aussi longue durée, de nuisances importantes imputables à de graves méconnaissances des dispositions législatives et réglementaires révèle en l'espèce un manquement fautif de l'administration à son obligation d'assurer le respect de la législation en vigueur; qu'il suit

(1) Pour des observations sur cet arrêt, voir Cathala, Roche et Tregouët, « Droit des installations classées et responsabilité de l'Etat », *Nuisances et Environnement*, mai 1978, p. 54-58, et A. Holleaux « Le juge et l'urbanisme », *Annales de la Voirie*, mars 1979, p. 64.

de là que le secrétaire d'Etat auprès du ministre de la Qualité de la Vie (environnement) n'est pas fondé à soutenir que c'est à tort que le tribunal administratif de Rennes a déclaré l'Etat responsable des conséquences dommageables pour le voisinage du fonctionnement irrégulier de cet établissement;

**DECIDE:**

*Art. 1<sup>er</sup>.* – Le recours de secrétaire d'Etat auprès du ministre de la Qualité de la Vie (environnement) est rejeté.



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**LA COUR DE CASSATION, CHAMBRE CRIMINELLE**  
**28 avril 1996**  
**Pourvoi N°95-85-253**  
**Arrêt N° 2035**

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Statuant sur les pourvois formés par:

1°) – Bxxxx

2°) – LAS SA Bxxxx, civilement responsable,

contre l'arrêt de la cour d'appel de NIMES, chambre correctionnelle, du 15 septembre 1995, qui, pour pollution de cours d'eau, a condamné le prévenu à 100 000 francs d'amende et a prononcé sur les intérêts civils; Joignant les pourvois en raison de la connexité;

Vu les mémoires produits en demande et en défense;

Sur le moyen unique de cassation pris de la violation des articles L. 232-2 du Code rural et de l'article 121-3 du nouveau Code pénal, de l'article 339 de la loi du 16 décembre 1992, de l'article 593 du Code de procédure pénale;

“en ce que l'arrêt infirmatif attaqué a déclaré Bxxxx coupable du délit de pollution de cours d'eau, en répression l'a condamné à une amende de 100 000 francs, et sur l'action civile a condamné Bxxxx, es qualités de président-directeur général de la société Teinturerie Bxxxx, à payer à la partie civile la somme de 2 000 francs 5 titre de dommages et intérêts;

“aux motifs que les procès-verbaux dressés par les services autorisés permettent de soutenir que la pollution a été constatée en aval de la teinturerie et seulement à ce niveau, sans que l'eau de l'affluent urbain puisse être mise en cause ainsi qu'il résulte de l'analyse effectuée sur place en ce point par l'agent de constatations; que Bxxxx ne peut nier qu'il déverse dans l'Arre des matières polluantes; que, lors de l'un des contrôles, les vannes du bassin de stockage avaient récemment été ouvertes; que, pour l'infraction constatée le 9 juillet 1993, Bxxxx a indemnisé l'association de pêche qui s'était plainte de ses agissements reconnaissant ainsi implicitement sa participation à la pollution de la rivière; qu'en tout état de cause, les analyses et prélèvements ne sont pas indispensables; que d'ailleurs des analyses en eau courante seraient pratiquement vaines à moins d'être effectuées au moment exact des déversements litigieux; que ces procès-verbaux sont parfaitement circonstanciés; qu'enfin l'une des pollutions d'est produite après la réouverture de la teinturerie Bxxxx en septembre; que ces éléments conjugués; alors que les eaux n'étaient pas spécialement basses, permettent de dire que les déversements des déchets de la teinturerie Bxxxx dans l'Arre sont responsables de la pollution de la rivière les 9 juillet et 3 septembre 1993;

“1°) alors que le délit de pollution de cours d'eau visé par l'article L. 232-2 du Code rural suppose l'existence démontrée de substances déversées par le prévenu; qu'il est constant que lors de l'établissement des procès-verbaux les 9 juillet et 3 septembre 1993, aucun prélèvement ni aucune analyse de l'eau permettant de déterminer les

substances déversées n'avaient été effectuées, de sorte qu'en décidant que la pollution de la rivière l'Arre constatée par ces procès-verbaux provenait des déchets de la teinturerie Bxxxx, la cour d'appel a violé les textes visés au moyen;

“2°) alors que, en toute hypothèse, le délit de pollution de cours d'eau n'est caractérisé qu'en l'absence de doute entre de déversement des substances imputé au prévenu et les atteintes aux poissons; que l'ensemble des pièces du dossier, notamment les procès-verbaux de gendarmerie, faisait ressortir l'absence totale de toute certitude sur un éventuel lien de causalité entre la mortalité du poisson constatée les 9 juillet et 3 septembre 1993 et les déversements d'eaux usées provenant de la teinturerie Bxxxx, compte tenu de la coexistence, ces jours-là, de nombreux facteurs défavorables à la vie aquatique, indépendants du fonctionnement de la teinturerie; qu'en déclarant cependant Bxxxx coupable des faits reprochés, la cour d'appel a violé les textes visés au moyen;

“3°) alors que le sous-préfet du Vigan, dans deux courriers des 6 octobre 1993 et 25 janvier 1994, ainsi que le directeur régional de la Direction régionale de l'industrie de la recherche et de l'environnement (DRIRE), dans un courrier du 20 janvier 1994, avaient expressément fait état du niveau bas des eaux de la rivière les 9 juillet et 3 septembre 1993, ce qui était un facteur de pollution; qu'en déclarant que les eaux n'étaient pas spécialement basses ces jours-là, en contradiction avec les constatations expresses des documents du dossier, la cour d'appel a entaché sa décision d'une contradiction de motifs;

“4°) alors que, en toute hypothèse, depuis l'entrée en vigueur de la loi du 16 décembre, dit “loi d'adaptation” au nouveau Code pénal, un délit non intentionnel réprimé par un texte antérieur à l'entrée en vigueur de cette loi n'est pas constitué en l'absence d'imprudence ou de négligence du prévenu; que la teinturerie dirigée par Bxxxx fonctionnait sous le contrôle étroit de l'Administration, en vertu des prescriptions édictées par un arrêté préfectoral sur les modalités de rejet des eaux usées dans la rivière l'Arre de sorte qu'en déclarant Bxxxx coupable du délit de pollution de cours d'eau, non intentionnel avant l'entrée en vigueur de la loi du 16 décembre 1992, sans rechercher si le prévenu avait eu un comportement imprudent ou négligent, la cour d'appel n'a pas légalement justifié sa décision au regard des textes visés au moyen;

“5°) alors que, subsidiairement, le prévenu auquel a été délivrée une autorisation administrative de rejets dans un cours d'eau à l'occasion de son activité, qui a respecté les normes prescrites par l'Administration et n'a fait l'objet d'aucune mise en garde de la part de cette dernière, est fondé à invoquer le fait justificatif résultant de l'autorisation reçue; qu'il est constant que Bxxxx avait été autorisé par l'Administration à déverser des rejets dans la rivière l'Arre en vertu d'un arrêté préfectoral, et n'a jamais reçu d'avertissement ou de mise en garde de la part de

l'Administration pour une éventuelle méconnaissance des dispositions de cet arrêté; qu'en déclarant cependant Bxxxx coupable des faits reprochés, la cour d'appel a méconnu les textes visés au moyen”;

Attendu que, pour déclarer le prévenu coupable du délit de pollution de cours d'eau, la cour d'appel relève que “la pollution a été constatée en aval de la teinturerie et seulement à ce niveau sans que l'eau de l'affluent urbain puisse être mise en cause”, que Bxxxx ne peut nier qu'il a déversé des matières polluantes dans la rivière l'Arre dès lors que “les vannes du bassin de stockage des eaux usées de son usine ont été retrouvées ouvertes” lorsque les enquêteurs ont procédé à leurs constatations et qu'il a lui même, en ce qui concerne les faits remontant au 9 juillet 1993, “indemnisé l'association de pêche qui s'était plainte de ses agissements”, reconnaissant ainsi, implicitement, comme l'a, à bon droit, relevé l'arrêt attaqué, “sa participation à la pollution de la rivière” à cette date, expressément visée à la prévention;

Que les juges du second degré ont en outre retenu que les procès-verbaux de constat des gendarmes étaient “parfaitement circonstanciés, “l'une des pollutions

notamment s'étant produite immédiatement après la réouverture de la teinturerie Bxxxx, en septembre 1993”, et les faits reprochés à celui-ci s'inscrivant au surplus dans un contexte persistant de pollution de ce cours d'eau par les eaux usées de son usine”;

Attendu qu'en l'état de ces motifs, la cour d'appel qui s'estimait suffisamment informée et qui a caractérisé l'infraction poursuivie en tous ses éléments tant matériels qu'intentionnel, a justifié sa décision sans encourir les griefs allégués.

Que, dès lors, le moyen ne peut qu'être écarté;

Etat attendu que l'arrêt est régulier la forme;

REJETTE les pourvois;

Sur le rapport de M. le conseiller GRAPINET, les observations de la société civile professionnelle DEFRENOIS et LEVIS, avocat en la Cour, et les conclusions de M. l'avocat général COTTE; M. Jean SIMON conseiller doyen, foons de président.





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**LA COUR DE CASSATION, CHAMBRE CRIMINELLE**  
**16 octobre 1996**  
**Pourvoi N° 95-82-165**  
**Arrêt N° 4524**

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Statuant sur le pourvoi formé par: - Rxxxx

Contre l'arrêt n° 149 de la cour d'appel de ROUEN, chambre correctionnelle, du 6 février 1995, qui l'a condamné pour exploitation d'une installation classée pour la protection de l'environnement en infraction à une mesure de suspension, à une amende de 20 000 francs; Vu le mémoire produit;

Sur le premier moyen de cassation, pris de la violation des articles 1, 3, 16, 18, 20 de la loi du 19 juillet 1976, 35 et 36 du décret du 21 septembre 1977, 111-5 du Code pénal, 593 du Code de procédure pénal, défaut de motifs, défaut de réponse aux conclusions, manque de base légale;

“en ce que l'arrêt attaqué a déclaré le prévenu coupable d'avoir exploité une installation classée pour la protection de l'environnement en infraction à une mesure de fermeture, de suppression ou de suspension (arrêté préfectoral du 27 février 1992);

“aux motifs qu'un procès-verbal a été dressé par un inspecteur des installations classées le 29 janvier 1992;

“que par arrêté du 27 février 1992, notifié à l'intéressé le 13 mars 1992, le préfet de Seine-Maritime a suspendu l'exploitation de l'installation jusqu'à la décision relative à la demande d'autorisation;

“que par procès-verbal dressé le 11 août 1993, l'inspecteur des installations classées a constaté que, nonobstant l'arrêté préfectoral intervenu, l'activité de la société n'avait pas cessé, générant une importante pollution qui avait été mise en évidence notamment par l'analyse en laboratoire des eaux résiduaires prélevées les 2 et 3 juin précédents, révélant pour 2 journées d'activité réduite, des taux de 800 kg/24 h de pollution oxydable et de près de 90 kg/24 h d'hydrocarbure.

“que les faits ne sont pas matériellement contestés;

“que la réglementation sur les installations classées résulte de la loi n° 76-663 du 19 juillet 1976 et du décret n° 77-1133 du 21 septembre 1977 pris pour son application;

“que la réglementation sur les installations classées administratives compétentes et qui ne fait en lui-même l'objet d'aucune discussion, l'activité de lavage intérieur de citernes qui est celle de la société De Rijke constitue une installation de traitement de déchets visée au n° 167 C de la nomenclature des installations classées qui nécessite une autorisation;

“que la rubrique a, certes, été créée par le décret n° 80-412 du 9 juin 1980, soit postérieurement à la loi du 19 juillet 1976 et au décret d'application du 21 septembre 1977;

“mais, que selon l'article 36 du décret du 21 septembre 1977 “les installations qui, après avoir été réquilièrement

mises en service, sont soumises, en vertu d'un décret relatif à la nomenclature des installations classées, à autorisation ou à déclaration peuvent continuer à fonctionner sans cette autorisation ou déclaration, sous réserve des dispositions ci-après, à la seule condition que l'exploitant ait fourni au préfet ou lui fournisse dans l'année de la publication du décret les indications prévues à l'article précédent”;

“qu'il n'est pas démontré ni d'ailleurs prétendu que les indications énumérées par l'article 35 et auxquelles renvoie l'article 36 susvisé auraient été fournies;

“que ce faisant, les droits acquis de continuer à exploiter sans autorisation ne sont éteints à l'expiration du délai fixé par le texte et malgré le rappel qui lui avait été fait le 27 juin 1991 par la DRIRE de Haute-Normandie de régulariser la situation, Rxxxx a maintenu l'exploitation de son activité sans autorisation;

“qu'il a délibérément persisté dans cette même attitude en dépit de l'arrêté préfectoral du 27 février 1992 qui ne peut être considéré comme dépourvu de motivation dans la mesure où il se fonde successivement, après avoir visé les textes concernés ainsi que le procès-verbal du 29 janvier 1992 et le rapport de l'inspection des installations classées en date du 12 février 1992 sur un ensemble de considérations parfaitement justifiées;

“que l'arrêté préfectoral concerné contient ainsi une motivation en droit et en fait suffisante pour être considérée comme respectant les prescriptions de l'article 1<sup>er</sup> de la loi du 11 juillet 1979;

“qu'il s'ensuit que le délit reproché à Rxxxx est constitué et que sa culpabilité doit être confirmée;

“alors que, d'une part, le non dépôt des renseignements visés à l'article 35 du décret du 21 septembre 1977 n'a pas d'effet sur les droits acquis que possédait une société de poursuivre son activité avant l'entrée en vigueur du décret la soumettant à la nomenclature des installations classées; que l'obligation de fournir les renseignements énumérés à l'article 35 du décret susvisé n'est pas prescrite à peine de déchéance, mais sanctionnée par une amende prévue à l'article 43-8 du même décret; qu'en l'espèce, la société De Rijke qui a succédé à la société Rouen Transports s'est installée, en 1970, que cette installation née avant le 1<sup>er</sup> janvier 1977, non soumise à la loi de 1917, ne pouvait être privée des droits acquis à continuer à exploiter son activité sans autorisation faute d'avoir respecté les indications énumérées par l'article 35; que pour en avoir autrement décidé, la cour d'appel n'a pas légalement justifié sa décision;

“alors, d'autre part, que le demandeur faisait valoir dans un chef préemptoire de ses conclusions d'appel, auquel la Cour a omis de répondre, que l'arrêté préfectoral du 27 février 1992, pris en application de la loi du 19 juillet 1976 et du décret d'application du 21 septembre 1977 était

illégal; qu'en effet, la société De Rijke fonctionnait depuis 1970; qu'un décret du 9 juin 1980 a soumis à la nomenclature des installations classées ce type d'activités; que la société disposait d'un droit acquis lui permettant de continuer son activité sans avoir sollicité d'autorisation ou à effectuer une déclaration; qu'ainsi, le préfet ne pouvait, par arrêté du 27 février 1992, mettre en demeure le demandeur de déposer une demande d'autorisation d'exploiter une station de lavage ni suspendre le fonctionnement de l'installation alors qu'il disposait de droits acquis; que, par suite, l'infraction à l'arrêté litigieux n'est pas constituée;

Vu lesdits articles, ensemble l'article 111-5 du Code pénal;

Attendu que, selon ledit article, les juridictions pénales sont compétentes pour interpréter les actes administratifs, réglementaires ou individuels et pour en apprécier la légalité lorsque, de cet examen, dépend la solution du procès pénal qui leur est soumis;

Attendu qu'il résulte de l'arrêt attaqué que la société De Rijke exploite, aux droits de la société Rouen Transports qui la faisait valoir depuis 1970, une installation de lavage intérieur de citernes, assimilée à une installation de traitement de déchets et inscrite au n° 167 c de la nomenclature des établissements classés par décret du 9 juin 1980, lequel a eu pour effet de la soumettre aux dispositions de la loi du 19 juillet 1976;

Que, sur le fondement d'un procès-verbal dressé le 29 janvier 1992 contre Rxxxx, directeur de la société De Rijke, pour exploitation de l'installation précitée sans autorisation administrative préalable, le préfet a pris le 27 février 1992 un arrêté portant mise en demeure de déposer un dossier de demande d'autorisation d'exploiter et suspendant l'exploitation, par application de l'article 24 de la loi du 19 juillet 1976; que, le 11 août 1993, procès-verbal a été établi contre le même pour exploitation d'une installation classée en infraction à une mesure de suspension;

Attendu que, pour rejeter l'exception prise de l'illégalité, pour excès de pouvoir et défaut de motivation, de l'arrêté préfectoral du 27 février 1992 servant de base aux poursuites, les juges du second degré énoncent que cet

arrêté "ne peut être considéré comme dépourvu de motivation" en ce qu'il se fonde, après visa notamment des textes concernés et du procès-verbal d'infraction du 29 janvier 1992, sur des éléments de droit et de fait suffisants pour satisfaire aux prescriptions de l'article 1<sup>er</sup> de la loi du 11 juillet 1979;

Mais attendu que, si le préfet tient de l'article 37 du décret d'application du 21 septembre 1977, dans les cas prévus aux articles 35 et 36 du même texte alors applicable, le pouvoir de prescrire, aux exploitants des installations pouvant, comme en l'espèce, continuer à fonctionner sans autorisation ou déclaration, les mesures propres à sauvegarder les intérêts mentionnés à l'article 1<sup>er</sup> de la loi du 19 juillet 1976 – mesures qui ne peuvent, notamment, entraîner de changements considérables dans le mode d'exploitation – ce pouvoir ne l'autorise pas à mettre l'exploitant en demeure de déposer une demande d'autorisation ou à suspendre l'exploitation de l'installation jusqu'à la décision relative à la demande d'autorisation;

D'où il suit qu'en se déterminant comme elle l'a fait, alors qu'il lui appartenait de constater, comme elle en était requise, l'illégalité de l'arrêté préfectoral du 27 février 1992, lequel ne saurait servir de base à une condamnation pénale, la cour d'appel a méconnu le sens et la portée du principe et des textes rappelés ci-dessus;

Que, dès lors la cassation est encourue;

PAR CES MOTIFS, et sans qu'il y ait lieu d'examiner le second moyen proposé;

CASSE ET ANNULE l'arrêt susvisé de la cour d'appel de ROUEN du 6 février 1995, en toutes ses dispositions;

Et attendu qu'il ne reste rien à juger, les faits poursuivis ne revêtant aucune qualification pénale;

DIT n'y avoir lieu à renvoi;

Sur le rapport de M. le conseiller MISTRAL, les observations de Me CHOUCROY, avocat en la Cour, et les conclusions de M. l'avocat général PERFETTI; M. Le GUNEHÉC président.



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**LA COUR DE CASSATION, CHAMBRE CRIMINELLE**  
**25 mai 1994**  
**Pourvoi N° 93-85. 158**  
**Bulletin Criminel:**

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Statuant sur le pourvoi formé par:- Lxxxx,

Contre l'arrêt de la cour d'appel d'ORLEANS, chambre correctionnelle, du 28 septembre 1993, qui, pour infraction à la loi du 15 juillet 1975 relative à l'élimination des déchets et à la récupération des matériaux et exploitation sans autorisation d'une installation classée, l'a condamné à un an d'emprisonnement avec sursis et 50 000 francs d'amende; Vu le mémoire produit.

Sur le premier moyen de cassation pris de la violation des articles 24 et 25 de la loi n° 75-633 du 15 juillet 1975 relative à l'élimination des déchets et à la récupération des matériaux, des articles 591 et 593 du Code de procédure pénale, défaut et contradiction de motifs, manque de base légale;

“en ce que l'arrêt attaqué a déclaré Lxxxx coupable d'avoir entreposé des déchets industriels, ou procédé à l'élimination de déchets industriels, en l'espèce du pyralène, et des transformateurs fonctionnant ou ayant fonctionné au pyralène, sans satisfaire aux conditions normales de stockage édictées par la réglementation en vigueur, notamment en enlevant ou en faisant enlever, aux lieux et dates ci-après, les appareils suivants:

“-6 transformateurs au pyralène à l'usine Kronospan de Sully-sur-Loire, en janvier 1989,

“-3 transformateurs au pyralène à l'usine Massey-Ferguson de Marquette-les-Lille (59), en novembre 1988,

“- 2 transformateurs au pyralène à Monoprix de bar-le-Duc, en janvier 1987,

“-2 transformateurs au pyralène à l'usine Ceraver de Tarbes, en décembre 1987,

“-9 transformateurs au pyralène à l'usine SKF à Ivry-sur-Seine, en novembre 1988;

“-1 transformateur au pyralène aux établissements IFD à Asnières, en juillet 1988”

“aux motifs que Lxxxx a exercé une direction de fait au sein de la société Orsay; qu'il résulte de plusieurs fax des 10 février 1987, 26 mars 1987, 19 mai 1987 à lui adressés, que les transformateurs devaient être transférés d'Argent-sur-Sauldre à Autry-le-Châtel; que Guérin a déclaré que Lxxxx s'était présenté en août 1986 comme le financier et le patron de la société Orsay; que Lxxxx lui-même dans sa déposition du 15 juillet 1987 s'est présenté comme le directeur de la Société Orsay depuis sa création en 1979; que cest sous sa propre signature sur papier à en-tête d'Orsay qu'il a adressé le 30 mars 1987 un courrier à la mairie d'Autry-le-Châtel ainsi libellé “nous avons l'intention de transférer sur Autry, une partie de nos activités”, que le contenu de cette lettre révèle à l'évidence un pouvoir de direction de la part de Lxxxx; que l'argument suivant lequel il se serait désengagé d'Orsay en novembre

1987 après l'arrivée de Gourdy implique à tout qu'il était bien engagé avant cette date;

“alors que si la loi du 15 juillet 1975 pose le principe de la responsabilité pénale de toute personne chargée à un titre quelconque de la direction, de la gestion ou de l'administration de l'entreprise ou de l'établissement qui a sciemment laissé méconnaître les dispositions réglementaires relatives à l'élimination des déchets et à la récupération des matériaux, cest à la condition que les juges du fond constatent que le pouvoir de direction, de gestion ou d'administration en question a été exercé à l'époque où l'infraction a été commise; que tel n'est pas le cas en l'espèce puisque la cour d'appel a expressément admis que le pouvoir de direction de Lxxxx avait cessé en novembre 1987 et que, dès lors, en entrant néanmoins en voie de condamnation à son encontre pour des violations par la société Orsay de la réglementation qui sont toutes postérieures à cette date, la cour d'appel n'a pas donné de base légale à sa décision”;

Attendu que, pour retenir, en sa qualité de gérant de fait de la société Orsay, la responsabilité pénale de Lxxxx, poursuivie pour avoir, de juin 1987 à janvier 1989, entreposé et éliminé irrégulièrement des déchets industriels, la juridiction du second degré a prononcé par les motifs repris au moyen; qu'elle ajoute que, si Lucien Gourdy a été, à compter du 12 novembre 1987, le gérant de droit de la société Orsay, le courrier n'en était pas moins contrôlé par Lxxxx au siège de la société, ce qui impliquait, “un pouvoir de direction au sein de ladite société”;

Attendu qu'en cet état, la cour d'appel a justifié sa décision au regard de l'article 25 de la loi du 15 juillet 1975, sans encourir les griefs allégués;

D'où il suit que le moyen ne peut être admis;

Sur le second moyen de cassation pris de la violation des articles 3 et la loi n° 76-663 du 19 juillet 1976 relative aux installations classées pour la protection de l'environnement, de l'article 112-1, alinéa 3, du Nouveau code pénal, de l'article 339 de la loi n° 92-1336 du 16 décembre 1992 relative à l'entrée en vigueur du Nouveau code pénal, de l'article 6 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, des articles 591 et 593 du Code de procédure pénale, défaut de motifs, manque de base légale;

“en ce que l'arrêt attaqué a déclaré Lxxxx coupable d'avoir exploité une installation classée A sans autorisation administrative exigées par la réglementation en vigueur;

“aux motifs que cest en toute connaissance de cause qu'a été mise en place une installation classée A sans autorisation administrative état rappelé que la préfecture, par arrêté du 20 juillet 1987, a mis en demeure la société Orsay de cesser l'exploitation des installations et que malgré cette interdiction, l'exploitation a continué avant d'arriver au

rejet de la demande le 18 mai 1989 par arrêté préfectoral et que Lxxxx était parfaitement au courant et intervenait dans les activités et l'entrepôt de déchets industriels ou d'élimination de déchets industriels sur le site d'Autry-le-Châtel;

“alors que les infractions à la législation des établissements classés édictées par des textes antérieurs à l'entrée en vigueur du Nouveau code pénal sont des délits non intentionnels; qu'aux termes de l'article 339 de la loi d'adaptation du Nouveau code pénal, tous les délits non intentionnels réprimés par des textes antérieurs à l'entrée en vigueur du Nouveau code pénal demeurent constituées en cas d'imprudence, de négligence ou de mise en danger délibérée de la personne d'autrui, même lorsque la loi ne le prévoit pas expressément; que ces dispositions étant plus douces que les dispositions antérieures, elles s'appliquent rétroactivement; que les faits ayant été jugés avant l'entrée en vigueur du Nouveau code pénal, les juges du fond n'avaient pas à s'expliquer spécialement sur un élément intentionnel qui n'appartenait à l'infraction; que leurs constatations sur ce point sont par conséquent surabondantes; qu'en revanche, la défense n'a pas été mise en mesure de s'expliquer sur la négligence, l'imprudence ou la mise en danger de la personne d'autrui et que, dès lors, l'annulation est encourue pour permettre à l'affaire d'être en application du principe du procès équitable posé par la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales (rejugée)”;

Attendu qu'il résulte de l'arrêt attaqué que Lxxxx avait également été renvoyé devant le tribunal correctionnel pour exploitation sans autorisation d'une installation classée;

Attendu que, pour déclarer le prévenu coupable de cette infraction, la juridiction du second degré relève que Lxxxx, gérant de fait de ladite société, a volontairement exploité sans autorisation l'installation précitée;

Attendu qu'en l'état de ces motifs la cour d'appel n'encourt pas le grief allégué;

Qu'en effet la seule constatation de la violation en connaissance de cause d'une prescription, légale ou réglementaire implique, de la part de son auteur, l'intention coupable exigée par l'article 121-3, alinéa 1<sup>er</sup> du Code pénal;

D'où il suit que le moyen doit être écarté;

Et attendu que l'arrêt est régulier en la forme;

REJETTE le pourvoi.

Sur le rapport de M. le conseiller JORDA, les observations de la société civile professionnelle PIWNICA et MOLINIE, avocat en la Cour, et les conclusions de M. l'avocat général GALAND; M. SOUPPE, conseiller le plus ancien, fons de président.





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**LA COUR DE CASSATION, CHAMBRE CRIMINELLE**  
**18 juin 1997**  
**Pourvoi N° 96-83.344**  
**Arrêt N° 3779**

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Statuant sur le pourvoi formé par :

- Jxxxx,

Contre l'arrêt de la cour d'appel de CAEN, chambre correctionnelle, du 5 avril 1996, qui, dans les poursuites exercées suivies contre lui notamment pour délits d'exploitation sans autorisation administrative d'une installation classée pour la protection de l'environnement et de pollutions de cours d'eau, l'a relaxé pour un délit de pollution de cours d'eau et l'a condamné pour les autres délits à 70 000 francs d'amende, dont 30 000 francs avec sursis, et a prononcé sur les intérêts civils; Vu les mémoires produits en demande et en défense;

Sur le deuxième moyen de cassation, pris de la violation des articles 1, 2, 3, 18 et 22 de la loi du 19 juillet 1976, 22 de la loi du 3 février 1992, 593 du Code de procédure pénale, défaut de motifs, défaut de réponse à conclusions, manque de base légale;

“en ce que l'arrêt attaqué a déclaré Jxxxx coupable d'exploitation non autorisée d'une installation classée et l'a condamné à des sanctions pénales ainsi qu'à des réparations civiles;

“aux motifs que, “vu des pièces du dossier, il est constant que l'établissement de la fromagerie Rxxxx situé à Saint-Désir de Lisieux était, au 30 décembre 1993, une installation soumise à autorisation au regard de la rubrique n° 242 de la nomenclature des installations classées pour la protection de l'environnement dès lors que sa capacité journalière de traitement de lait dépassait 70 000 litres de lait; or cet établissement n'avait pas déposé la demande d'autorisation d'exploiter prévue par l'article 3 de la loi du 19 juillet 1976; par arrêté préfectoral du 31 décembre 1993, elle a été mise en demeure de déposer un dossier de régularisation dans un délai de 3 mois dont le prévenu reconnaît qu'il expirait le 4 avril 1994; par arrêté préfectoral du 12 juillet 1994, notifié à partir du 18 juillet 1994, ce délai a été prorogé jusqu'au 31 décembre 1994; il est constant que le 16 juin 1994, date visée à la prévention, le responsable de l'entreprise n'avait pas déposé de demande d'autorisation d'exploiter et n'avait pas satisfait à la mise en demeure du 31 décembre 1993 puisque le dossier déposé seulement en mai 1994 était manifestement insuffisant, incomplet et comportait des indications erronées pour répondre utilement aux demandes de l'autorité préfectorale; enfin, l'arrêt prorogeant le délai pour satisfaire à la mise en demeure de déposer un dossier de régularisation ne peut avoir pour effet de faire disparaître une infraction constituée antérieurement alors que, de surcroît, l'entreprise n'avait pas satisfait au premier arrêté de mise en demeure”;

“alors qu'il appartient au juge pénal, pour qualifier l'infraction aux règles relatives aux installations classées, de constater les violations reprochées à l'industriel;

“que la cour d'appel ne pouvait, sans se contredire et priver sa décision de tout fondement légal, constater d'une part que l'usine de Saint-Désir de Lisieux avait bénéficié d'un arrêté préfectoral prorogeant jusqu'au 31 décembre 1994 le délai de régularisation de sa situation administrative, et retenir, d'autre part, qu'au 16 juin 1994, l'entreprise ne satisfaisait pas aux prescriptions relatives aux installations classées, ce qui justifiait, selon la Cour, la répression”;

Attendu que, pour retenir la culpabilité du prévenu du chef d'exploitation sans autorisation d'une installation classée pour la protection de l'environnement, la cour d'appel prononce par les motifs repris au moyen;

Qu'en cet état, et dès lors que l'arrêté préfectoral prorogeant le délai fixé par la mise en demeure initiale de régularisation, en pouvait avoir pour effet de faire disparaître l'infraction constatée antérieurement, la cour d'appel a justifié sa décision sans encourir les griefs allégués;

Sur le troisième moyen de cassation, pris de la violation des articles 1, 2, 3, 18 et 22 de la loi du 19 juillet 1976, 22 de la loi du 3 février 1992, L. 232-2 du Code rural, 593 du Code de procédure pénale, défaut de motifs, défaut de réponse à conclusions, manque de base légale;

“en ce que l'arrêt attaqué a déclaré Jxxxx coupable d'avoir, à Saint-Désir de Lisieux, les 17 juin, 28 juin et 13 juillet 1994, laissé s'écouler dans les eaux superficielles, directement ou indirectement, des substances dont l'action ou les réactions ont, même provisoirement, entraîné des effets nuisibles sur la santé ou des dommages à flore ou à la faune et l'a condamné à des sanctions pénales ainsi qu'à des réparations civiles;

“aux motifs que “il est constant que des déversements en provenance de la fromagerie Rxxxx ont été constatés le 21 avril 1994 dans le cours d'eau “le Cirieux”; ainsi un garde du Conseil supérieur de la pêche a relevé une coloration opalescente de l'eau, la présence d'accumulation de matières grasses de couleur blanche en surface; Jxxxx, responsable de la fromagerie Rxxxx a fait valoir qu'“ne coupure d'électricité avait déprogrammé la pasteurisation du lait en cours; quand le courant avait été rétabli, la mémoire de l'automate avait entraîné la vindange de l'installation de pasteurisation; un volume de 300 à 400 litres de lait contenue dans les circuits aurait rejoint le poste de relevage des effluents de la fromagerie; l'afflux du lait dans le bac de stockage des eaux résiduelles a occasionné le débordement de ce bassin vers le cours d'eau “le Cirieux”, affluent de la Touques; le 12 juin 1994, une nouvelle pollution de ce cours d'eau s'est produite sur environ un kilomètre à partir de l'établissement de production de la fromagerie Rxxxx à Saint-Désir de Lisieux et, plus précisément, à partir du poste de stockage et de relevage des effluents de la fromagerie; l'eau du Cirieux était devenue très opalescente et une mortalité piscicole a été constatée, affectant des truites, des chabots, des vairons

et des loches; à la suite du désamorçage accidentel des pompes de relevage, le poste de stockage des effluents de la fromagerie avait, ce jour là, débordé; ainsi, le réseau d'assainissement déversait également des eaux fortement polluées provenant notamment de la collecte des effluents de la fromagerie Rxxxx, effluents qui avaient provoqué l'obstruction du réseau d'assainissement; l'alarme installée depuis l'incident du 21 avril 1994 n'avait pas été perçue, le nouvel incident ayant débuté un dimanche;

“le 28 juin 1994 a été constatée une nouvelle pollution du Cirieux à partir de la fromagerie...; le 13 juillet 1994, a été constatée une nouvelle pollution des eaux du Cirieux entraînant une mortalité de poissons à partir des installations de la fromagerie et via le réseau communal d'assainissement; le prévenu ne peut trouver un cas de force majeure exonératoire de responsabilité dans la panne de ses installations ou la coupure générale d'électricité dès lors que de tels incidents n'étaient pas imprévisibles ni irrésistibles, et que l'insuffisance manifeste des installations, au regard du volume quotidien des effluents, empêchant d'y parer”;

“alors que les communes sont responsables des dommages causés par la capacité insuffisante de leurs stations d'épuration;

qu'en se bornant, pour condamner Jxxx, à constater des faits de pollutions dus à l'insuffisance manifeste des installations au regard du volume quotidien des effluents” (p. 8 alinéa 8), sans rechercher si cette insuffisance de capacité était celle de l'usine ou celle du réseau d'assainissement communal, dont l'arrêt attaqué relève qu'il s'est trouvé “obstrué” (p. 6 alinéa 2), la cour d'appel a privé sa décision de tout fondement légal au regard des textes visés au moyen”;

Attendu que, pour déclarer le prévenu coupable de pollutions de cours d'eau, l'arrêt attaqué relève qu'à trois reprises, courant juin et juillet 1994, le poste de stockage des effluents de la fromagerie a débordé et que ceux-ci ont provoqué l'obstruction du réseau d'assainissement de la commune en provoquant des écoulements nuisibles à la faune et à la flore du cours d'eau “le Cirieux”; que l'arrêt prése que l'insuffisance manifeste des installations de stockage des eaux résiduelles de l'usine de Saint-Désire de Lisieux, au regard du volume quotidien de ces effluents, a été la cause de ces incidents qui n'étaient “ni imprévisibles ni irrésistibles”;

Attendu qu'en l'état de ces motifs, la cour d'appel a justifié sa décision sans encourir les griefs allégués;

Que, dès lors, le moyen ne peut qu'être écarté;

Sur le premier moyen de cassation, pris de la violation des articles 1, 2, 3, 18 et 22 de la loi du 19 juillet 1976, 22 de la loi du 3 février 1992, 593 du Code de procédure pénale

défaut de motifs, défaut de réponse à conclusions, manque de base légale;

“en ce que l'arrêt attaqué a déclaré Jxxxx coupable d'exploitation non autorisée d'une installation classée et coupable d'avoir, à Saint-Désir de Lisieux, les 12 juin, 28 juin et 13 juillet 1994, laissé s'écouler dans les eaux superficielles, directement ou indirectement, des substances dont l'action ou les réactions ont, même provisoirement, entraîné des effets nuisibles sur la santé ou des dommages à la flore ou à la faune et l'a condamné à des sanctions pénales ainsi qu'à des réparations civiles;

“aux motifs que Jxxxx invoque le fait qu'il ne pourrait être déclaré pénalement responsable des infractions au motif que la SA Fromagerie Rxxxx ne lui aurait confié la responsabilité de la direction de l'usine de Saint-Désir de Lisieux qu'à compter du 1<sup>er</sup> janvier 1995; cependant le courrier du 19 décembre 1994 ainsi vanté par le prévenu rappelle la satisfaction érioyvée depuis sa “nomination à la responsabilité de Saint-Désir” effective depuis le 1<sup>er</sup> avril 1994; la décision du 19 décembre 1994, de par son libellé même, ne peut être considérée que comme la confirmation définitive de Jxxxx à son poste; au surplus, il sera relevé qu'entre avril et décembre 1994, le prévenu écrivait constamment aux différentes autorités en rappelant sa qualité de directeur d'usine, pour traiter de la régularisation de la situation administrative de son établissement et qu'il prenait des directives écrites relatives à cette situation, à l'égard de son personnel; dès lors, il convient de retenir qu'à la date des faits, objet de la poursuite, Jxxxx avait reçu de son employeur la compétence, l'autorité et les moyens nécessaires pour assumer, par délégation de pouvoirs, la responsabilité pénale des infractions commises lors de l'exploitation de l'établissement de Saint-Désir; enfin, sans méconnaître le fait que le prévenu a pris ses fonctions seulement le 1<sup>er</sup> avril 1994, celui-ci ne pouvait sérieusement ignorer les conditions illicites d'exploitation, ni la mise en demeure du 31 décembre 1993, ce que démontrent ses différents courriers versés aux débats; cest donc en vain qu'il fait plaider l'absence d'intention frauduleuse”;

“alors, d'une part, que, si le chef d'entreprise, à qui incombe en principe la responsabilité pénale des infractions commises par la personne morale qu'il dirige, peut déléguer ses pouvoirs à un préposé, qui endosse alors la responsabilité pénale qui naît des faits relevant du secteur d'activité qu'il surveille, il n'en va ainsi que si ce préposé possède la compétence, l'autorité et les moyens nécessaires;

“la délégation de pouvoirs doit être certaine et exempte d'ambiguïté;

“qu'en déduisant l'existence d'une délégation de pouvoirs consentie à Jxxxx de la lettre par laquelle le président-directeur général de la société annonce au salarié qu'il prendra la direction de l'usine à compter du 1<sup>er</sup> janvier

1995, soit postérieurement aux faits litigieux, la cour d'appel n'a caractérisé aucune délégation de pouvoirs certaine et régulière au moment des faits et a privé sa décision de toute base légale au regard des textes visés au moyen;

“alors, d'autre part, qu'en considérant que la nomination de Jxxxx “à la responsabilité de l'usine de Saint-Désir” équivalait à la direction de l'usine, ce qui était pourtant contredit par les termes du courrier du 19 décembre 1994 qui distinguait bien les deux fonctions, la cour d'appel, qui ne s'explique pas sur ce point pourtant essentiel à la solution du litige, a privé sa décision de motifs;

“alors, enfin, que dans ses conclusions d'appel, Jxxxx faisait valoir que les procès-verbaux dressés à la suite des infractions syndiquaient que c'est M. Dxxxx qui était la personne pénalement et civilement responsable des faits (concL.p. 5 alinéa 1<sup>er</sup>);

“qu'en laissant sans réponse ces conclusions de nature à démontrer qu'au moment des faits, Jxxxx n'était titulaire d'aucune délégation de pouvoirs, la cour d'appel a violé l'article 593 du Code de procédure pénale”

Attendu que, pour retenir la culpabilité du prévenu des chefs d'exploitation d'une installation classée sans autorisation et de pollution de cours d'eau courant juin et juillet 1994 et pour rejeter son argumentation selon laquelle la direction de la fromagerie ne lui aurait été confiée qu'à compter du 1<sup>er</sup> janvier 1995, l'arrêt attaqué relève que le courrier du 19 décembre 1994, mentionné au moyen, ne peut s'interpréter que comme une confirmation de sa nomination à la direction de l'usine dont il assumait déjà la responsabilité effective depuis le 1<sup>er</sup> avril 1994; que les juges ajoutent qu'à la date des faits, “il avait reçu de son employeur la compétence, l'autorité et les moyens nécessaires pour assumer, par délégation de pouvoirs, la responsabilité pénale des infractions commises dans cet établissement”.

Attendu qu'en cet état la cour d'appel a justifié sa décision, sans encourir les griefs allégués;

Que, dès lors, le moyen ne saurait être accueilli;

Et sur le quatrième moyen de cassation, pris de la violation des articles 1, 2, 3, 18 et 22 de la loi du 19 juillet 1976, 22 de la loi du 3 février 1992, L.232-2 du Code rural, 1382 du Code civil, 593 du Code de procédure pénale, défaut de motifs, défaut de réponse à conclusions, manque de base légale;

“en ce que l'arrêt attaqué, infirmatif sur ce point, déclare recevable la constitution de partie civile de la commune;

“aux motifs que “la commune de Saint-Désir de Lisieux fait valoir que l'exploitation illicite sans autorisation a causé des dommages au réseau d'assainissement...; elle

démontre par les pièces de l'enquête pénale que les effluents transitant par les cuves de 3 et 12 m<sup>3</sup> de la fromagerie sont envoyés directement dans le réseau d'assainissement sans passage par un bassin d'homogénéisation et de neutralisation dont la réalisation est, cependant, prescrite par la DRIRE dans le cadre de la demande d'autorisation d'exploiter une installation classée; Jxxxx avait précisé lors de l'enquête que les effluents pouvaient être soit très acides soit très basiques selon les périodes d'exploitation; or la commune verse des pièces qui tendent à établir que la nature basique des effluents serait de nature à aggraver les buses en amiante ciment du réseau d'assainissement; le jugement sera donc réformé en ce qu'il a déclaré irrecevable la constitution de partie civile de cette commune; en effet, le préjudice de cette dernière peut résulter directement des conséquences du délit d'exploitation d'installation classée sans autorisation; cependant, la présence d'autres usagers dans le secteur et l'absence de preuve de l'absence de dégâts en amont de la fromagerie... rendent nécessaire le recours à une expertise pour déterminer les dommages strictement imputables à l'établissement, dans le cadre de la prévention dont la Cour est saisie;

“alors, d'une part, que la cour d'appel ne pouvait, sans se contredire et priver sa décision de toute base légale au regard des textes visés au moyen, considérer qu'au moment des faits de pollution relevés (12 juin, 28 juin et 13 juillet 1994) l'installation de la fromagerie n'était pas conforme aux prescriptions de la DRIRE, ce qui justifiait l'action civile de la commune contre l'entreprise, et constater, par ailleurs, que la fromagerie bénéficiait d'une prorogation de délai jusqu'au 31 décembre 1994 pour déposer le dossier de régularisation;

“alors, d'autre part, que, pour qu'une constitution de partie civile soit recevable, il est nécessaire que les circonstances sur lesquelles elle s'appuie permettent au juge d'admettre comme possibles l'existence du préjudice allégué et la relation directe de celui-ci avec une infraction à la loi pénale;

“qu'en se bornant à relever que le préjudice subi par la commune “peut résulter directement des conséquences du délit d'exploitation d'installation classée sans autorisation” (p. 9 alinéa 5), la cour d'appel n'a pas caractérisé une relation directe et certaine du préjudice avec l'infraction à la loi pénale”;

Attendu que, pour accueillir la commune de Saint-Désir de Lisieux en sa constitution de partie civile et ordonner une expertise afin de déterminer les dommages – compte tenu de la présence d'autres usagers dans le secteur – strictement imputables à l'établissement dirigé par le prévenu, l'arrêt attaqué retient que certains des effluents incriminés étaient de nature à endommager les collecteurs du réseau d'assainissement et que le préjudice peut résulter directement des conséquences du délit d'exploitation sans autorisation de l'installation classée;

Attendu qu'en cet état la cour d'appel, qui a fait l'exacte application des articles 2 et 3 du Code de procédure pénale, a justifié sa décision;

Que, dès lors, le moyen ne saurait être accueilli;

Et attendu que l'arrêt est régulier en la forme;

REJETTE le pourvoi.

Sur le rapport de M. le conseiller GRAPINET, les observations de la société civile professionnelle ANCEL et COUTURIER-HELLER et de la société civile professionnelle PEIGNOT et GARREAU, avocats en la Cour, et les conclusions de M. l'avocat général DINTILHAC; M. BLIN conseiller le plus ancien, faisant fonctions de président.

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***Cases in Russian***

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**SUPREME ARBITRAL COURT OF UKRAINE**

**DECISION IN THE NAME OF UKRAINE**

**November 19-20, 1997**

**Case No 1/47**

**EDITOR'S NOTE:**

The following texts are an unofficial translation from the original Ukrainian into Russian, and then into English.

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The Judge Gusak M.B. after considering the case on the ground of the complaint of the Joint Stock Company “Okean” (shipbuilding company) and the Mykolaiv Environmental Association “Zelenyi svit” against the Ministry of the Environmental Protection and Nuclear Safety of Ukraine for the declaration the conclusions of the state environmental expertise to be invalid and the defendant to be obliged to prohibit financing and building of a complex for the loading of the fertilizers, in the presence of the REPRESENTATIVES of:

the plaintiff: Skrylnikov D.V.- the advocate, Moroz B.M.- the engineer, Member of the Parliament of Ukraine;

the defendant: Pobochenko L.I.- the chief of the projects expertise department, Kovalenko M.A.- deputy chief of the legal department,

#### **FOUND:**

In 1995, with the violation of the requirements provided by the Laws of Ukraine “On the Environmental Protection” and “On the Environmental Expertise”, in the city of Mykolaiv there was started the construction of the complex for the loading of the fertilizers (the potassium terminal) without positive conclusion of the State Environmental Expertise.

The construction was suspended by the Deputy Minister, the Head State Inspector of Ukraine on the environment protection until positive conclusions of the State Environmental Expertise of this project as a whole were made.

On December 15, 1995, the State Department of the Ministry of the Environmental Safety of Ukraine in the region of Mykolaiv made negative conclusions concerning this project and returned the technical-economic calculations (TEC) for revision.

On December 27, 1995, the officials of the Ministry of Environmental Safety of Ukraine took the decision to start the process of the realization of the State Environmental Expertise by the Ministry directly and charged the Ukrainian Scientific Center of the Sea Ecology (USCSE) with the preparation of the draft conclusions.

Pursuant to the conclusions of the State Environmental Expertise of 18.06.96. approved by the Minister of the Ministry of the Environmental Safety of Ukraine, the materials of TEC (“The scientific evaluation of TEC of the complex for loading of the fertilizers in the city of Mykolaiv and the draft conclusions of the State Environmental Expertise” signed by the scientific chief, the director of the USCSE and the responsible executor, the guru research officer, Ph.D. in Geology ) were returned to the revision.

On May 6, 1996, the State Environmental Expertise made positive conclusions on the materials of TEC and also

indicated that the decision about the appropriateness of the practical realization of TEC should be taken by the local government taking into account the interests of the city and its residents.

The plaintiffs, which didn’t agree with the validity of this conclusion, filed a complaint to the court.

At the court sitting the representatives of the plaintiffs supported their demands under the complaint.

The representatives of the defendant didn’t admit the complaint.

Having heard the arguments of the representatives of both parts and having examined the materials of the case, the Court considers that the plaintiffs’ demands under their complaint are well-grounded.

Pursuant to the article 45 of the Law of Ukraine “On the Environmental Expertise” the conclusions of the State Environmental Expertise can be declared invalid by a court, in particular in case of the violation of the legislation on the realization of the State Environmental Expertise.

The fact of such violation was confirmed during the court sitting.

As the Court found, the final conclusion of the State Environmental Expertise was prepared on May 5, 1996, the previous- on April 18, 1996.

The article 10 of the above-mentioned Law obliges the applicants to announce through the mass media about the realization of the State Environmental Expertise in the form of a special Declaration on the environmental impact of the proposed activities involving building and operating of the object, which could adversely impact on the environment and the human health, before the realization of the State Environmental Expertise.

This requirement of the Law is aimed to guarantee the main principles of the environmental expertise. Among others, the principles of publicity, objectivity, complexity, variance, precaution and due account of the public opinion.

In this case the defendant didn’t comply with and didn’t take due consideration of this requirement of the Law (in the conclusions of the expertise already realized on April 18, 1996 the defendant itself considered as necessary the publication of the Declaration on the environmental impact of the proposed activities in the Mykolaiv local mass media. In spite of the fact that such Declaration hadn’t been published before the beginning of the realization of the environmental expertise (as it is required by the Law) and after the defendant’s decision about it in the conclusion of 18.04.96, the defendant made the positive conclusion of the State Environmental Expertise on May 6, 1996).

Such Declaration was published on July 9, 1996 only two months later after the realization of the expertise (see Book 1, p.24).

Part 2 of the Article 34 of the above-mentioned Law specifies that the State Environmental Expertise of those types of activities and objects which bear high environmental risk shall be carried out ONLY after the announcement of the Declaration on the environmental impact of the proposed activities by the applicant through the mass media.

In addition, the Law obliges the applicant to submit to the bodies responsible for the environmental expertise the set of the documents with the grounds of the evaluation of the impact on environment.

Pursuant to the article 21 of the same Law the determination of the order of the handing over the documentation to the State Environmental Expertise is in the competence of the Cabinet of Ministers of Ukraine.

The documentation concerning the objects of the State Environmental Expertise shall be approved by the bodies concerned in accordance with the established procedure and shall contain the evaluation of likely social consequences (Article 15 of the Law).

The Court considers that those requirements were violated during the realization of the expertise in question.

The Court has not any evidence for the approval of the documentation by the State Supervisory Committee on Occupational Safety (necessary to determine whether the documentation meets the requirements of the laws on the occupational safety), as it is required by Act on the Procedure on Submitting of the documentation for the State Environmental Expertise, approved by the Resolution of the Cabinet of Ministers of Ukraine of 31.10.95. No870 (para 11 of the Act and part 2 of the para 1 of the Supplement No2 to the Act).

The Court cannot agree with the defendant's arguments, given in the response to the complaint and supported by his representatives during the court sitting, that the fact that the Declaration hadn't been published before the beginning of the realization of the expertise but long after the realization didn't impact on the expertise conclusions and didn't restrict the possibility of the public and of the individuals to participate in the discussion concerning the building of the potassium terminal in the city of Mykolaiv and to hold the public and other environmental expertises because there were a lot of publications in the mass media concerning this issue.

The Law didn't provide for a possibility to substitute special Declaration on the environmental impact of the proposed activities by other publications in the mass media.

Besides, the definition of the procedure of the realization of the State Environmental Expertise, pursuant to the article 18 of the Law, is the competence of the Parliament of Ukraine.

The compliance with the procedure determined by the Parliament of Ukraine (by the Law) is an obligation and the task of the Ministry, as well as of other subjects of the environmental expertise.

Only publication of the Declaration with all necessary data indicated in Article 35 of the Law, the environmental impact of building and operating of the terminal could have given the possibility to the non-governmental organizations and individuals to fully enjoy their rights, according to laws and other legal acts.

They could have challenged and disagreed with the validity of the foreseen environmental consequences in result of the terminal building and operating, if they had had in their disposal the Declaration on these consequences. Such Declaration had to contain the facts about the goal and means of the activities, substantial factors, which influenced or might influence on the state of environmental taking into account possible extreme cases, the quantitative and qualitative figures of the evaluation of the levels of the environmental risk of such activities, and the measures taken to ensure conformity of the proposed activities with the environmental standards and norms.

Part 2 of the Article 10 of the Law of Ukraine "On the Environmental Expertise" obliges the environmental expert bodies and agencies after the completion of the environmental expertise to announce its conclusions through the mass media.

With the violation of this requirement, the conclusions of the State Environmental Expertise of 6.05.96 contained only a recommendation to publish (without pointing who should do that) a summary of those conclusions in the Mykolaiv local mass media.

Thus, the defendant didn't take into account the Law requirement on the obligatory character of the publication of the conclusions of the State Environmental Expertise.

Moreover, the defendant realized new State Environmental Expertise on its own initiative violating the legislation requirements (the articles 13 and 39 of the Law) as it was necessary to realize only an additional expertise because the State Environmental Expertise with the negative conclusion already existed.

With the violation of these requirements of the Law (para 4 of the Article 32, Article 34 of the Law) the Ministry of Environmental Safety took the decision about financing of the state expertise not at the expense of the applicant, but at the expense of the off-budget fund for the

environment protection, and also realized the expertise without the examination of the presence and scope of all necessary materials (para 1 of the Article 33 of the Law).

Pursuant to the Article 50 of the Law the violation of the determined by law procedure of the realization of the environmental expertise constitutes a wrongful act in the field of the environmental expertise. The persons who are guilty of the violation of the legislation on this matter bear disciplinary, administrative, civil and criminal responsibility.

The court agreed with the validity of other arguments of the plaintiffs and their representatives during the court sitting and, among others, concerning the violation of the procedure on the realization of the environmental expertise by the experts; the absence of the necessary data of the experts; the non-observance of the necessary order of stating of the content of the conclusions of the environmental expertise; the non-consideration of many substantial circumstances; the violation of the principles of the realization of such expertise:

- The scientific evaluation of TEC was realized by one person, without necessary data about his professional level and education, professional experience;
- In any case, this valuation by a holder of a Ph.D. in Geology can not correspond to the principle of complexity;
- The conclusion wasn't approved by the territorial subdivision of the State Geology Committee (the fact is confirmed by a statement of SGA "Prychornomotgeologia");
- The Supplement to TEC- 3829.00.002, Environmental Impact Assessment (EIA), does not contain any information about the its authors what is against the law requirements. It was signed by the director of the Analytic Center of the Environmental Safety of Development, who has Ph.D in Sciences, and his deputy for the research & scientific issues and it doesn't contain the answers to all comments and questions, which appeared during the preparation of the previous conclusions.
- The conclusion was made without taking into account the impact on flora and fauna, a part of which is registered in the Red book of Ukraine and is subject to special protection. The plaintiffs gave sufficient arguments for the presence of such kind of fauna in the place of building and operating of the object.

- The conclusions lack calculations of adversary impact of the air on the workers of other businesses situated (as claimed by the plaintiff) within 100m. The calculations were made on the supposition that people were 1200m away from the object.

The Court cannot agree with the validity of the arguments of the defendant in so far as they state that the decision on the appropriateness of the practical realization of TEC is taken by local government and that the conclusions of the State Environmental Expertise doesn't influence on the decision-making since one of the principles of the environmental expertise (Article 6 of the Law) are environmental safety, territorial & branch-wise and economic appropriateness of the realization of the objects of environmental expertise.

The defendant didn't take into account the fact that the defendant was acting as a public authority while realizing environmental expertise.

These violations of the requirements of the Law and other legal acts are substantial and outrage, they violate environmental human rights, principles and goals of the environmental expertise, rights and protected by law interests of the subjects of environmental expertise. They make disputed conclusions of the State Environmental Expertise invalid.

On the basis of articles 2, 22, 33-34, 49, 82-85 of the Code of Administrative Procedures of Ukraine, the Court

#### **HELD**

To sustain the complaint.

1. To declare the conclusions of the State Environmental Expertise No10-3/17-18 of 6.05.1996 to be invalid.
2. To oblige the Ministry of the Environmental Protection and Nuclear Safety to take measures to stop the construction of the Complex until a proper State Environmental Expertise with positive conclusion concerning its constructing and operating is realized.
3. To recover 85 hryvnas to the Mykolaiv Regional Environmental Association "Zelenyi svit" at the expense of the Ministry of the Environmental Protection and Nuclear Safety. To make an order.

The Judge

Gusak M.B.

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**SUPREME ARBITRAL COURT OF UKRAINE  
CHRESHCHATYK ST., 552001, KYIV-1**

**PLAINTIFF: JOINT STOCK COMPANY “OKEAN” SHIPBUILDING COMPANY”  
ZAVODSKA SQUARE, 1, 327050, MYKOLAIV,  
MYKOLAIV REGIONAL ENVIRONMENTAL ASSOCIATION “ZELENYI SVIT”  
VELYKA MORSKA ST., 45, 327030, MYKOLAIV**

**DEFENDANT: MINISTRY OF THE ENVIRONMENTAL PROTECTION AND NUCLEAR  
SAFETY OF UKRAINE  
CHRESHCHATYK ST., 5, 252001, KYIV-1,**

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### **Complaint For the declaration of the conclusions of the state environmental expertise to be invalid**

In August of 1995, the close corporation ‘Nikatera’ started the construction of a complex for loading of the fertilizers on the bank of Bug firth, near the shipbuilding company “Okean”.

From the very beginning the constructing and financing of the complex had been carried out with rough violations of the requirements provided by the Laws of Ukraine “On the Environmental Protection” and “On the environmental expertise”, without positive results of the State Environmental Expertise (the letter #29-1/2-3-926, 15.12.95.)

On May 6, 1995, the Ministry of the Environmental Protection and Nuclear Safety of Ukraine approved the positive conclusion of the State Environmental Expertise with violation of the legislation on the State Environmental Expertise, namely:

1. The principle of the publicity was violated since the applicant didn’t announce in proper time, through the mass media, the Declaration on the environmental impact of the proposed activities (the Declaration) (Article 10 of the Law of Ukraine “On the environmental expertise”). The applicants for the environmental expertise of the objects, which can have adverse impact on the environmental state and human health during the process of their realization (building, operating, etc.), shall announce through the mass media about such planned expertise in their Declaration on the environmental impact of the proposed activities. After the completion of the environmental expertise, bodies or agencies carrying out environmental expertise shall inform their conclusions through the mass media. In its conclusions, the Ministry of Environmental Safety only recommended to publish the conclusions’ summary in local mass media.

Pursuant to the article 34 of the Law of Ukraine “On the environmental expertise”, which provides for the conditions and grounds for environmental expertise realization, and to the para 6.4. of the Instruction on the realization of the state environmental expertise (approved by the order of the Ministry of Environmental Safety, 07.06.95 #55, and filed with the Ministry of Justice of Ukraine, 12.06.95 #214/750), practical realization of the state environmental expertise of the documents concerning the types of activity and objects (which are regarded as of high environmental risk pursuant to the list confirmed by the Government of Ukraine) shall be carried out after the announcement through the mass media of the applicant’s Declaration on the environmental impact of the proposed activities. Pursuant to the List of the types of activities and objects of high environmental risk (approved by Decision of the Cabinet of Ministers of Ukraine of 27.06.95, #554) the object in question is of a high environmental risk.

The Declaration on the environmental impact of the proposed activities was published only on July 9, 1996 in

the newspaper “Vechirniy Mykolaiv” (#75), 2 months after the approval of the expertise’s results and only after the appeal of those results. It constitutes the violation of the legal requirements of the realization of the state environmental expertise, and the principle of the publicity and due regard to public opinion. The articles in the local mass media concerning the problems of the building of the potash fertilizers terminal, which the Ministry of Environmental Safety security refers to in the response to the appeal of the state environmental expertise (Letter #10-3/17-78, 4.07.96.) are not sufficient for ensuring of timely and appropriate public participation in the decision-making, which affects or may affect the natural environment. Indicated articles do not provide, to full extent, the facts about the goal and means of the activities, the substantial factors, which influence or may influence on the state of environment taking into account the possible extreme cases, the quantitative and qualitative figures of the valuation of the levels of the environmental risk of such activities, and the measures taken to ensure conformity of the activities the environmental standards and norms, all of which shall provided by Declaration on the environmental impact of the proposed activities. In addition, the Declaration shall contain the obligations of the applicant for the environmental expertise to ensure compliance with the environmental safety requirements in the process of the planned activity operation (Article 34 of the Law of Ukraine “On the environmental expertise). The public was provided with all above-mentioned information with a large delay, only after the state environmental expertise conclusion and the official beginning of the project realization.

There are the grounds to believe that the published Declaration text didn’t correspond to the original text of the Declaration on the environmental impact of the proposed activities, which had been forwarded for the state environmental expertise (for example, in the state environmental expertise conclusion #10-3/17-18, 18.04.96, there is classification of the calcium chloride to be loaded at the terminal (para 1.1. and part 2 of the para 1.2. of the Observations concerning the object characteristics), while the published Declaration didn’t contain such information).

2. The results of the state environmental expertise (#10-3/17-18, 6.05.96.) were approved without compliance to all requirements, which were necessary to make an unambiguous and final evaluation- as it was demanded by the previous conclusion (#10-3/17-18, 18.04.96.); in particular, without full revision and correction of the relevant materials of the TEC pursuant to the observations and proposals given in that conclusion, and without the publication in Mykolaiv local mass media of a Declaration on environmental impact of the proposed activities changed so as to ensure its compliance with EIA documents.

3. The results of the state environmental expertise didn’t take into account public opinion of the residents of Korabelny district of the city of Mykolaiv (where the terminal was planed to be built) and of the residents of the

coastal areas of the firth (approximately, 10,000 signatures were collected against the building of the terminal, see Supplement #3). It contradicts with the main principles of the state environmental expertise (para 2, Article 6) and with the requirements of Article 11 of the Law of Ukraine “On the environmental expertise”.

4. The results of the state environmental expertise didn't correspond to the requirements of article 43 of the Law of Ukraine “On the environmental expertise”. For example, introductory (protocol) part lacks for the information on the experts staff, date and time when it was carried out, the body which takes the decision concerning the realization of the object of environmental expertise.

5. Concerning the substantial part of the environmental expertise: the EIA materials and the following conclusion of the state environmental expertise didn't contain the complete evaluation of the object's impact on the state of environment and didn't take into account reliable data about the state of the environment in the region where the object of the environmental expertise, which could adversely impact on the environment, the natural resources and the human health, was to be realized. It is confirmed by the public environmental expertise (The expert conclusion on the TEC of the complex for loading of the fertilizers), by the letter from Olshanski fishing collective farm (#1-18, 12.01.96.), by the materials of the observations by Hydro-Meteorological Center. The materials of EIA and the expertise conclusion lacked for the data about likely harm to the aquatic life species registered in the Red Book (6 species of the amphipoda and 1 species of mollusks. The Red Book of Ukraine, 1994). In addition, 3 species of the gasteropods molluscs with endemics of the Dnipro-Bug firth, which are not included to the Red Book of Ukraine, yet (The article by V.V.Anistratenko “The gasteropods molluscs of the Dnipro-Bug firth and the problem of their preservation” in the report collection “The problems of the preservation of the flora and fauna species registered in the Red Book of Ukraine”, 1994).

These materials show that important data about the state of fish resources and the environmental situation in the area of the Bug firth and the South Bug river (including presence of the cholera vibrio) were not taken into account. And, consequently, the construction and operation of this object will lead to the deterioration of the environment, natural resources and will create a threat to the human health.

The construction and operation of this object, with the violation of the environmental citizens' rights, will lead to a substantial deterioration of state of the environment and natural resources and will create a threat to the human health. In view of the violation of the Article 9 of the Law of Ukraine “On the Environmental Protection”, Articles

10, 11, 34, 43 of the Law of Ukraine “On the environmental expertise” and pursuant to the Article 45 of the Law of Ukraine “On the environmental expertise”, Articles 2, 14 of the Code of Administrative Procedures of Ukraine

WE ASK THE COURT FOR THE JUDGEMNET AS FOLLOWS:

1. To declare the results of the state environmental expertise #10-3/17-18, 6.05.96, to be invalid.
2. To stop financing and building of the complex for loading of the fertilizers.
3. To grant the plaintiff the reimbursement of the arbitral costs.

Supplements:

1. The letter from the Ministry of Environmental Safety #29-/2-3-926 (15.12.95.) concerning the construction of the terminal for loading of the fertilizers in Mykolaiv.
2. Copies of the conclusions of the state environmental expertise of the materials of the corrected technical-economic calculations (TEC) of the construction of the complex for loading of the fertilizers in Mykolaiv #10-3/17-18, 18.04.96. and 6.05.96.
3. The Declaration on environmental impact. The newspaper “Vecherni Nikolaev” #75, 3.07.96.
4. The citizens' signatures against building of the terminal.
5. The letter from the fishing collective farm #1-18, 12.01.96.
6. The appeal of the conclusions of the state environmental expertise.
7. The letter from the Ministry of Environmental Safety #10-3/17-78 concerning the conclusions of the state environmental expertise on TEC of the construction of the complex for loading of the fertilizers in Mykolaiv
8. Data on the observations of the Hydro-Meteorological Center.
9. The copy of the receipt of the arbitral costs payment.
10. The confirmation of the fact of handing to the defendant (the Ministry of Environmental Safety) the copies of the complaint and supplemented documents.

Vice-president  
of the Joint Stock Company  
“Shipbuilding company “Okean”  
P.V.Syvak

Deputy chief of the  
Mykolaiv Regional Environmental  
Association “Zelenyi svit”  
S.V.Shapovalov