UNEP

COMPENDIUM OF SUMMARIES OF JUDICIAL DECISIONS IN ENVIRONMENT RELATED CASES

REVISED 2ND EDITION DRAFT REFERENCE DOCUMENT

January 2015

INTRODUCTION

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

- Creation of a UNEP Global Alliance of Chief Justices and Senior Judges from over 100 countries, fully supportive of the UNEP Judges Programme and have declared their commitment to carry out capacity building of Judges **at national level** with the support of UNEP and its partner agencies,
- Creation of Regional Judges Forums for the Environment in Europe, Pacific, Southern Africa, Eastern and West Africa, the Arab States, the Francophone States and the Caribbean
- Development of a UNEP Judges Handbook and other Manuals/ case law books, including this Compendium, to respond to call from judiciaries of the developing world for urgently required books on environmental law. It became evident during the above mentioned global, regional and national judges meetings that most judges from developing countries do not have access to books on environmental law in their libraries. Some of these publications have also been translated to national languages (Chinese, Khmer, Lao and Vietnamese) at the request of national judiciaries.
- UNEP continues to work with various partners to deliver environmental law programs for the judiciaries, prosecutors, and other legal stakeholders. This includes national sensitization programs for judges and magistrates through

engaging national judicial institutions with support of UNEP and partner agencies.

This revised 2nd edition of the Compendium of Judicial Decisions in Environment related Cases includes summaries of several additional cases post 2005. It includes a new index of cases by continent and, alphabetically, by country, as well as by subject matter.

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

Index of Cases

AFRICA

Kenya

Mauritius

South Africa

THE AMERICAS

Canada

United States of America

Colombia

ASIA

Bangladesh

India

Malaysia

Nepal

OCEANIA

EUROPEAN COURT OF JUSTICE

INTERNATIONAL COURT OF JUSTICE

INTERNATIONAL TRADE AGREEMENTS

EUROPEAN COURT OF HUMAN RIGHTS

KENYA 1

Sylvia C. Endere (Plaintiff) versus Karen Roses Ltd (Defendant) Civil Case 298 of 2005

High Court of Kenya at Nakuru

(Kimaru, L. J)

Case Link

Introduction:

The plaintiff filed suit seeking order of permanent injunction to restrain the defendant, a commercial farmer, from excavating, constructing, directing or channeling storm water, waste water, or any other substances into the plaintiff's dam or in the grounds of a nearby primary school. The plaintiff argued that this activity would pollute her source of water to the detriment of her livestock, poultry and the surrounding environment. The defendant opposed the application. She contended that she was requested by members of the primary school to desilt the dam situated in the school compound which had become heavily silted and therefore was no longer serving as a reservoir for water use by the community.

Legal Framework:

The Environmental Management and Coordination Act section 3, 58-68, Second Schedule paragraph 4 (Act No. 8 of 1999).

Held:

The court concluded that no environmental impact assessment had been prepared nor had the approval of the National Environmental Management Authority been sought before the dam at the primary school had been desilted by the defendant. This was a requirement according to the Environmental Management and Coordination Act. Furthermore, the defendant was required by law to consult all the parties likely to be affected by the said dam before it undertook the rehabilitation of the dam.

In these circumstances the court held that the plaintiff had established a prima facie case as to entitle her to the order of injunction sought pending the hearing and determination of the suit.

KENYA 2

Charles Lukeyen Nabori and 9 Others V Attorney General and Another Petition 466 of 2006

High Court of Kenya at Nairobi

(Aganyanya, D.K.S.)

Case Link

Introduction:

The Kenyan government and the Food Agricultural Organization undertook a joint project in 1982 that introduced prosopis juliflora ("the weed") in baringo district. Petitioners claimed that the weed had caused extensive damage to the lake basin ecosystem and it had become dangerous. They claimed the government had shown no efforts to solve the problem and that the right to a clean and healthy environment was being breached by its unabated spread. Therefore they asked whether the weed could be declared a noxious weed in the same category with other weeds set out in the suppression of Noxious Weeds Act-Environment Management and Coordination Act, and the Suppression of Noxious weeds Act.

Petitioners seeked the declarations, inter alia, that their rights to life as set out in section 71 of the Constitution had been compromised by the introduction of the weed, the respondents claimed that section 3(3) of The Environment Management and Coordination Act did not create any rights for the petitioners under the Constitution..

Legal Framework:

The Environmental Management and Coordination Act section 3,

Suppression of Noxious Weeds Act cap 325 Laws of Kenya.

Convention on Biological Diversity 1992

Stockholm Declaration on human environment 1972 and the Rio Declaration 1992

PCCC No. 67 of 2005 between Community Museums of Kenya and Kenya Forestry Research Institute and Food & Agricultural Organization (Public Complaints recommendation).

Held:

Petition was dismissed based on the fact that the noxious effects could not be foreseen at the time the plant was introduced, and no specific subject could be considered responsible, and that there was not sufficient evidence of the infringement of the constitutional rights.

KENYA 3

Narok County Council (1st appellant). Kenya Tourism Federation (2nd appellant) v. National Environment Management Authority. (NEMA)(1st respondent), Wasafiri Camp Limited (2nd respondent) and Ben Kipeno and others (interveners), Kenya Investment Authority-(interveners) Tribunal Appeal net / 07 of 2006

National Environment Tribunal at Nairobi

(Kanairu, D.; Mumma, J.; Stanley, S.; Njihia, J.)

Case Link

Introduction:

By a notice of Appeal, the Appellants Narok County Council and the Kenya Tourism Federation filed an Appeal against the 1st Respondents' issuance of an Environmental

Impact Assessment (EIA) certificate to the 2nd Respondent, Wasafiri Camp Limited. The grounds stated by the 1st Appellant were that, the Respondents did not publish the Environmental Impact Assessment (EIA) Project Report for the public to respond; no public hearings were held in order to involve major stake holders and affected parties; the 1st Respondents did not address themselves to the cumulative environmental impact of the development on the Masaai Mara ecosystem; the 1st Respondents went against the recommendations of their own technical team against the proposed development and the 2nd Respondent carried out the development of Wasafiri camp without complying with the relevant laws, by laws and guidelines governing the site region. The 2nd Appellants grounds were that, the 1st Respondent approved the 2nd Respondents EIA project report even though it did not conform to the requirements of the Environmental Impact Assessment and Audit Regulations; there was lack of adequate participation by stake holders and furthermore the report did not indicate the cumulative environmental impacts of the proposed development; the 1st Respondents in reaching their decision, ignored the views from various stakeholders, affected parties and their own technical team and thus acted contrary to their objects and functions as prescribed in the Environmental Management and Coordination Act (EMCA). In Response to the Appellants allegations the 1st Respondent stated that the procedure and steps followed were proper, and in accordance with EIA and Audit regulations and that they did not provide for a public hearing to be held. The 2nd Respondents stated in their response that the Appellants had no locus standi to prefer an appeal under EMCA and challenged the power of a warden to prefer an appeal on behalf of Narok county council. They stated that the entire appeal was based on false information. The interveners stated that the development was on private land and that the appellants acting based on self-interest rather than environmental conservation.

Legal Framework:

The Environmental Management and Coordination Act section 3,129(1),

Environment Impact Assessment and Audit Regulations 2003 regulations 9, 10(2) (3),

The Factories (Building Operations and Work of Engineering Construction) Rules 1984

Land Control Act CAP 302 (repealed by The Land Act No 6 of 2012)

Physical Planning Act Cap 286

Water Act 2002

Held:

The Tribunal after reviewing the matter unanimously ordered that, NEMA's approval of the 2nd Respondents EIA Project report be set aside; the project proponent prepare and submit a full EIA study report in accordance with EMCA to NEMA for determination thereon, furthermore, no further development activity was to take place till this was done.

KENYA 4

MR. Gitiriku Wainaina and MRS. Gitiriku Wainaina v. Kenafric 2007
National Environment Tribunal at Nairobi

(Kanairu, D.; Mumma, J.; Stanley, S.; Njihia, J.)

Case Link

Introduction:

The plaintiffs sought an Injunction against the defendants from operating their business on a piece of land adjacent to the plaintiffs own, until they put a stop to and or controlled Liquid waste, Chemicals and Noxious waste that flowed onto the plaintiffs property. They also sought Damages for the effects of the same as well as loss of rent due to the inhabitability of affected sections of the property. The Defendants denied causing the discharge of offensive and pestilential gases causing a nuisance; causing the discharge of harmful waste; causing flooding of, or damage to the plaintiffs' premises; or being negligent. They also argued that their factory was in an area designated for light industrial use and that the City council of Nairobi had given planning permission for the construction of the factory. In constructing a block of flats for residential use the *volenti non fit injuria* principle was applicable and therefore the plaintiffs were estopped from complaining.

Legal Framework:

The Environmental Management and Coordination Act 1999

Held:

The Tribunal found that the plaintiffs did not adduce sufficient evidence in support of Mr. Wanaina's evidence regarding lost rent and therefore declined to award compensation for the same. The Tribunal also stated that the area in which the properties were found was designated for mixed residential and light industrial use; therefore the principle of *volenti non fit injuria* did not apply. The Tribunal however found that the defendants were liable for the damage suffered by the plaintiffs as a result of the corrosion on the roofing of the plaintiffs' block of flats and further ordered that they pay Kshs. 354,000/- as compensation for the same.

KENYA 5

Republic v National Environmental Management Authority ex parte Sound Equipment Limited CIVIL APPEAL NO. 84 OF 2010

Court of Appeal in Nairobi

(Visram, A.; Omolo, R.S.C.; Onyango Otieno, J.W.)

[Case Link]

Introduction:

Sound Equipment Limited (the appellant) was appealing against a decision of the High Court dismissing its application for judicial review orders challenging an order by NEMA requiring the appellant to cease the construction of residential houses because concerns had arisen that the project would lead to the pollution of Mathare River. After receiving its Environmental Impact Assessment Licence, the appellant started the construction of the proposed houses. However, during the course of the project, NEMA issued an order stopping the work ostensibly because the construction was causing the pollution of the Mathare River which ran through the appellant's land. NEMA cited the fact that the project posed environmental threats which could not be reasonably foreseen at the time of the Environmental Impact Assessment study as well as its review. As a result, it directed the appellant to halt the construction immediately, to carry out a fresh EIA with in-depth evaluation of the potential impacts associated with the project and to provide a forum for the public participation of interested stakeholders.

The appellant filed judicial review proceedings in the High Court seeking an order of certiorari to quash NEMA's decision and the conditions attached to it as well as an order of prohibition to prohibit NEMA from enforcing the order or from cancelling the appellant's Environmental Impact Assessment License.

Under section 129 of the Environmental Management & Co-ordination Act (EMCA), it is provided that any person who is aggrieved by a decision of NEMA may appeal against it at the National Environmental Tribunal within sixty days. Though the High Court agreed that the existence of an alternative remedy cannot by itself prevent a court from issuing a judicial review order, the Court was concerned, and sought to know from the appellant, why he had preferred to challenge NEMA's decision directly in the High Court rather than by first lodging an appeal with the Tribunal. Ultimately, the Court was not satisfied about the appellant's preference for judicial review.

Legal Framework:

The Environmental Management and Coordination Act section 129,

Odera & Others v. NEMA, HMSC No. 400 of 2006

Held:

While concurring with the High Court's decision, the Court of Appeal held that where there was an alternative remedy and especially where an appeal procedure has been provided in an Act of Parliament, it is only in exceptional circumstances that an order for judicial review would be granted. In determining whether an exception should be made and judicial review orders granted, the Court observed that it was necessary for a court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.

As far as the merits of the case was concerned, the Court of Appeal noted that the appellant must have been aware that there were serious complaints against its project, one of which was that the Water Resources Management Authority had raised the probability of Mathare River being polluted by soil excavated during the construction and the possibility of effluence from the proposed septic tanks seeping into the river. The Court pointed out that matters concerning the environment do not merely concern NEMA and the party against which a complaint is raised but concerned all Kenyans and hence the essence of public participation. The Court further observed that by issuing the order directing the appellant to stop the construction and to prepare a second Environmental Impact Assessment Report, NEMA, even if it had previously failed to ensure adequate participation of the public in the previous report, was availing an opportunity to the appellant to ensure the participation of bodies such as the Water Resources Management Authority, the Kabarage Estate Company Ltd., the Greenbelt Movement and any other interested persons and bodies.

In its conclusion, the Court cited with approval the decision by Nyamu J (as he then was) in Odera & Others v. NEMA, HMSC No. 400 of 2006, that though construction projects such as the one in this case involved the expenditure of large sums of money on the part of the proponent, injury or health concerns might not be adequately measured in terms of shillings, pence and pounds and as such, the consideration of financial loss on the part of the appellant could not override environmental concerns.

The appellant's appeal was therefore dismissed with costs.

KENYA 6

James Mahinda & Others v.Director General-National Environment Management Authority and Universal Corporation Tribunal Appeal No Net/28/2008 National Environment Tribunal at Nairobi

(D; Kanairu, J; Dwasi,A; Mumma,S; Stanley, J; Njihia)

[Case Link]

Introduction:

By notice of Appeal, the Appellants wanted that the 2nd Respondent, Universal Corp. be ordered to stop operating its factory in an area zoned residential. The grounds given by the Appellants were; that the factory emitted offensive smoke, vapors and fumes into other neighboring residential homes; that the factory produced loud and disturbing noises from metal fabrication works and operating machines which often run nonstop for several days; that the 2nd Respondent continued to carry out the activities despite the inconvenience caused to others in the area; the noxious fumes caused irritation to both humans and livestock as well. The 2nd Respondent in response to the above stated that it carried out its activities in strict compliance with the conditions in its title document and pursuant to the

Licence granted to it by the National Environment Management Authority. They stated that the factory had installed legally required systems ensuring that no offensive/pollutive substances were released into the air. They adduced documentary evidence to this effect. With regard to the noise allegations they stated that all activities were carried out in the factory building and therefore could not affect the Appellants. They did however concede that at the time of carrying out the environmental impact assessment the noise level tests were not satisfactorily carried out.

Legal Framework:

The Environmental Management and Coordination Act 1999 sections 68, 69, 126, 129,130

NET /27/2008 Richard Evans & 6 others v National Environmental Management Authority & 2 others.

NET/04/05 Phenom Limited v National Environmental Management Authority & Riverside Gardens Residents Association

Held:

The tribunal after hearing witnesses for both sides found that, the company had proved their high environmental management standards while the Appellants had not adduced any sufficient evidence supporting their claims therefore the Appeal failed and declined to give the order prayed for. They however urged the company to examine what additional measures should be taken to reduce the noise further.

KENYA 7

Adnan Karama Petroleum Limited T/A A.K. Filing Station (Appellant) v. National Environment Management Authority (Respondent) Tribunal Appeal No. Net 03/05/2005

National Environment Tribunal at Nairobi

Kaniaru,D:; Mumma, A:; Waudo, S.; Dwasi, J.; Njihia, J.

Case Link

Introduction:

The Appellant appealed against an order issued by the Respondent to close a facility used as a petrol filling station in Nairobi. The Respondent's close order, which led to this appeal, was communicated to the appellant following submission by the Appellant of an Environmental Audit Report on the facility and a site visit by the Respondent's officers.

The Appellant's grounds of appeal were, inter alia, that the Appellant had not been given a chance to be heard before the close order was issued by the Respondent; that the close order was illegal and unlawful as it did not conform to the mandatory provisions of law, especially the Environmental Management and Co-ordination Act (EMCA); and that there was no likelihood that continued operation of the station jeopardized the environment in any way.

The respondents stated that the Audit Report prepared by the Appellant's expert presented a finding that the petrol filling station presented a major significant risk of harm to the environment and public health.

Legal Framework

Environmental Management and Co-ordination Act (EMCA) 1999 section 9,68, 108 (4) (c) and (d), 148,

Petroleum Act, Cap. 116, Rule 22, 30(6)

The Physical Planning Act, Cap. 286

National Environment Tribunal Procedure Rules, 2003 Rule 38

Environmental (Impact Assessment and Audit) Regulations of 2003

Rodgers Muema Nzioka & 2 Others vs. Tiomin Kenya Ltd. (High Court Civil Case No. 97 of 2001)

Held

The Tribunal held that the Appellant's operations were not only not in compliance with the law, they also posed significant risk of damage to public health and the environment. The Appellant's environmental audit expert presented a finding of "major significant impacts" in the audit report. The finding was preceded in the audit report by a clear indication that "the operation of the petrol station will continue to expose it as a high fire risk activity." Further, the expert presented a statement that fuel storage next to water supplies could contaminate the water.

The Tribunal was also of the view that the petrol station lacked a forecourt to prevent soil contamination with oil, lacked properly constructed underground petrol storage tanks, lacked a proper drainage system, did not pre-treat oil wastes before channeling them into a nearby storm water drain, that the facility lacked a canopy for proper air circulation, that the petrol station was too close to a bus stop, that the facility used part of a public side walk and bus stop, that the facility lacked proper ventilation, that it was located on a high speed section of the road close to a roundabout, that it obstructed pedestrians and vehicles on a section of the road and that it presented a high risk of fire. It finally found that the location of the Appellant's facility did not allow for necessary remedial measures to be taken to bring the facility and its operations into compliance with the law.

MAURITIUS 1

Mesnil Investments Co. Ltd. v Environment Appeal Tribunal, Minister of the Environment, Human Resource, Development and Employment 2000 SCJ 172 In The Supreme Court of Mauritius Hon. A.G. Pillay, Chief Justice.

Case Link

Introduction:

The appellant is appealing to this Court, pursuant to section 49(1) of the Environment Protection Act 1991, (called "the Act") against the decision of the first respondent, as being erroneous in law, which affirmed on appeal that of the second respondent refusing the grant of an Environment Impact Assessment (EIA) licence to the appellant in respect of a morcellement project consisting of the subdivision of its portion of agricultural land under sugar cane cultivation of an extent of 44.8251 hectares situate at Trianon (called "the land in lite") into 96 plots for agricultural purposes. The second respondent's decision was reached on the sole ground that "it is contrary to the Government's Policy of dividing cane fields into smaller lots which will be owned/managed by a large number of persons and lead to counter productivity and adverse impact on national economy. According to a survey carried out by the MSIRI, small plots of land are more vulnerable to socio-economic problems like inheritance, land speculation and housing developments.

Legal Framework:

Environment Protection Act 1991

Rio Declaration: Principle of Sustainable Development

Held:

In its preamble the Act provides "for the protection and management of the environmental assets of Mauritius so that their capacity to sustain the society and its development remains unimpaired and to foster harmony between quality of life, environmental protection and sustainable development for the present and future generations. In section 18, the Minister may, where an EIA provides insufficient information to determine the scope or the impact of the undertaking on the environment, people or society, disapprove the EIA. It is clear, therefore, from the language and broad objects of the Act already mentioned, that the protection of the environment is an all-embracing concept which not only deals with environmental issues proper but also with public interest issues or issues affecting the welfare or economy of a state.

Consequently, both respondents were right in giving paramount consideration to the government's policy of not allowing large sugar canes fields to be divided into smaller lots because of its adverse impact on productivity and on the national economy.

In any event, as correctly submitted by learned Counsel for the respondents, even on the assumption that there had been a mistake in granting an EIA licence to Société Ramdonee by the second respondent, the first respondent was right to have been on its guard against making a second mistake in granting the EIA licence sought by the appellant, in breach of the provisions of the Act.

For all the reasons given, the court dismissed the appeal, with costs.

MAURITIUS 2

Naigum R.L v Nanette G 2004 SCJ 286
In The Supreme Court of Mauritius

Case Link

Introduction:

The respondent (the plaintiff in the court below) lodged an action against the appellant (defendant in the court below) before the Intermediate Court averring that the appellant was carrying out his activities as cabinetmaker without licence in the building adjoining her house which was in a residential area. She complained that the appellant's trading activities involved the running of electrical machines which were a constant source of nuisance and pollution caused by noise and wood dust. After having heard evidence, the magistrate found the respondent's case proved. She awarded her Rs 150,000 as damages and made an order in terms of her prayer "prohibiting and restraining the appellant, either himself or through any of his agents 'prepossess' from using the electrical machineries, sawmill, hammers and other cabinet making machineries and equipment in the appellant's premises."

The appellant has appealed against the said judgment. The appellant adduced evidence that he opened his workshop in 1992 and worked on site only twice a week. He had ever since taken all the necessary precautions to abate the **noise** level of the machines by putting up a thick wall and double glazing enclosures. He denied that there was any dust explaining that the machines were fitted with dust extractors and admitted that he had continued operating his workshop without the required licence in order to earn his living and also despite his having been prosecuted and ordered to stop his trading activities. The report of Dr. Veeraragoo whom he also called as his witness supported his version. Dr. Veeraragoo visited his workshop in February 1998 at his request and found that there was no problem of either dust or environmental **pollution** emanating from the appellant's workshop. Learned counsel for the appellant submitted that the magistrate ought not to have rejected Dr. Veeraragoo's report. The magistrate's reasons for having given little credence to it is that Dr. Veeraragoo had inspected the premises for only one hour from 10.30 hrs to 11.30 hrs on a particular day - in the absence of the respondent or the representatives of the municipal authorities - at a time when the windows and doors were closed. Also reproaches the magistrate for not having distinguished between material and moral damages. The short answer to this is that evidence was ushered in as regards both the material and moral prejudice suffered.

Legal framework:

Court of Civil Appeal Act and Noise Prevention Act.

Held:

The court was unable to say that the magistrate made a wrong assessment of the evidence before her as a whole. She believed the respondent's evidence and was satisfied that her health condition was due to the noise and dust emanating from the appellant's workshop. The magistrate had not rested content with commenting upon the demeanor of the respondent but also analysed all the evidence presented to her. She stated that he did not impress her as being a trustworthy and reliable witness. It is also clear from the tenor of her judgment that her comment on the appellant's persistence to run his workshop in defiance of the law was far from being the only factor that made her decide against the appellant. Also the magistrate was fully justified in making a global assessment of Rs 150,000 to be awarded after having taken into account that as a result of the appellant's injurious activities the respondent could no longer earn her living, she had endured inconvenience over a period of time and the effect on her health had not been negligible. We do not find that the sum awarded is exaggerated in the circumstances.

The appeal was dismissed.

MAURITIUS 3

Island Fertilizes Ltd v Mauritius Chemical and Fertilizer Industry Ltd & 9 others 2005 SCJ 244

In The Supreme Court of Mauritius

Case Link

Introduction:

On October 14, 2005, the applicant applied for a summons calling upon the respondent and co-respondent no. 1 to 8, pending a main case to be entered praying for a perpetual injunction, to show cause why an interlocutory order in the nature of an injunction should not be issued restraining and prohibiting the respondent from (a) unloading ammonium nitrate based fertilizer grade 30-06-00 into Mauritius; and (b) importing anymore ammonium nitrate based fertilizer 30-06-00. There was also a prayer for any order that I may think fit and reasonable to issue in the circumstances.

It was submitted by learned counsel for the respondent that the respondent had obtained the necessary permit to import ammonium nitrate based granule 30-06-00 from co-respondent no.1 and that ammonium nitrate based granule 30-06-00, which is different from pure ammonium nitrate is not a dangerous substance and consequently there was no requirement for an EIA licence. Anyway, it was said that the respondent had obtained an EIA clearance when it constructed the shed which was meant to store the fertilizers. Submission was also made as to the delay the present application was entered and that there was no urgency since the application was not made ex-parte but for a summons to show cause. It was argued that the applicant besides being a competitor of the respondent had no locus standi to enter the present action. It was further argued that the balance of convenience was in favour of the respondent as it was not denied by the applicant that the community of planters is waiting for fertilizers. Finally, it was said that the applicant had not given any undertaking as to damages nor in a further affidavit referred to the point raised by the respondent and that great prejudice would be caused to the respondent who would be liable for extra charges for the immobilization of the ship at port.

Legal Framework:

Environment Protection Act 2002

Dangerous Chemicals Control Act 2004

Le Petit Morne Ltée v Town and Country Planning Board [1998 SCJ 141]

Held:

The Court held that it is not within its province to prevent the importation of ammonium nitrate based granule 30-06-00 fertilizers. There is the Dangerous Chemicals Control Board set up under section 6 of the Dangerous Chemicals Control Act 2004 (the said Act) which issued permit for importation of dangerous chemicals as provided for under section 10 of the said Act. It is an administrative decision by a statutory body and any action against the decision of the board should be by way of judicial review and not to the judge in chambers (Le Petit Morne Ltée v Town and Country Planning Board [1998 SCJ 141])

Ammonium nitrate is classified under the list of dangerous chemicals under the First Schedule to the said Act and it is not 'an extremely dangerous chemical' under the Second Schedule to the said Act. Under section 2 of the said Act, 'dangerous chemical' is defined as "a chemical substance specified in the First Schedule and includes an extremely dangerous chemical; and any pesticide."

Under the same section of the said Act, 'chemical substance' is defined as "any chemical element, product or preparation, and its compound in the natural or manufactured state." In the light of the above definition and notwithstanding what the various experts had stated in their affidavits placed before me, ammonium nitrate based granule 30-06-00 fertilizer, is certainly "a compound in the manufactured state" being a mixture of 'ammonium nitrate' and 'phosphate' and consequently, a "dangerous chemical", import of which requires a permit under section 10 of the said Act. My view is confirmed by the fact that co-respondent no.1 had delivered a permit to the respondent for the importation of ammonium nitrate based granule 30-06-00 fertilizer.

The court need not consider the issue of balance of convenience, the absence of undertaking for damages or the locus standi of the applicant, since it is of the view that there was no need for an EIA licence for the unloading of fertilizer which was the application before it having regard to the proecipe and irrespective of what had been said in the affidavits in support.

For the reasons given, the application is set aside with costs.

MAURITIUS 4

The (Mauritius) C.T. Power Ltd v The Minister of Environment and Sustainable Development CN: 02/2011

The Environment Appeal Tribunal Justice(s) P.M.T Kam Sing, H. Gunesh and B. Sewraj

Case Link

Introduction:

This is an appeal against the decision of the Minister of Environment and Sustainable Development [the Respondent] refusing an EIA licence to The (Mauritius) CT Power Ltd [the appellant] for the setting up of a 2 x 55MW Coal fired power plant at Pointe aux Caves, Albion. The decision of the minister was taken on 13 January 2011 and the appellant lodged the present appeal on 15 February 2011 under Section 54 of the Environment Protection Act2002 [EPA]. It is also worth pointing out at this juncture that the site at Pointe aux Caves is sometimes referred to as Montagne Jacquot.

It is common ground that the application for an EIA licence was rejected by the Minister on the basis of the precautionary principle for the following three reasons:

(i) The site is not conducive for such a development;

(ii) The adverse impacts on the residential areas due to the inconveniences and disturbances associated with traffic; and

(iii) The likely health impacts on the inhabitants of the locality and surrounding areas.

Legal Framework:

Environment Protection Act (No. 19 of 2002) section 23, 54,55(3),

J.M Ricot and Others. v. Mauriplage Beach Resort Ltd. [2004 SCJ 329]

L.C.Entresol and Ors. v. Saltlake Resorts Ltd. [2004 SCJ 305]

Held:

Any development or activity is not without impact on the environment but a right balance has to be struck between the need for development and the environment considering the benefits on the one hand and the threats to the environment on the other. On the evidence placed before us we are of the view that the benefits to the economy, the provision of relatively low cost of electricity generation, diversification of sources of production of electricity, security in supply of electricity for the industries and for the people in general clearly outweighs the possible inconveniences that could be caused.

The respondent's objection that there will be adverse impacts on the residential areas due to the inconveniences and disturbances associated with traffic, the likely health impacts on the inhabitants of the locality and surrounding areas and that the site is not conducive to the development have not been supported by any proper expert evidence in his respective field except the version of the Director of the Department of Environment; and likely health impact remained hypothetically "likely" against the HIA. For all the reasons given the tribunal finds that the appellant has established its case against the respondent on the balance of probabilities.

The court therefore amends the decision of the Minister rejecting the EIA licence to grant the appellant an EIA licence to proceed with the setting up of a 2x 55 MW coal-fired power plant at Pointe Aux Caves, Montagne Jacquot including, but not limited to the following conditions together with other conditions to be determined by the Department of Environment:

i. Conditions for the control of mercury, acid gases, soot and particulates such as PM10 and PM2.5, the installation of a combination of SO2 emissions controls, NOX emissions controls and fabric filters as well as measures that would ensure that stack emissions should comply with the most stringent standards of the WHO, the US EPA or the EEA and the EPA 2002 (Standards for Air);
ii. Transportation of coal should be done strictly off peak hours as from 9:30 hrs up to 14:30 hrs. and after 18:00 hrs up to 21:00 hrs. at latest;
iii. Coal to be stocked in such a way so as to avoid dispersion through wind;

iv. Effluents resulting from the washing of lorries to be treated so as to avoid any risk of contamination of ground water by heavy metals such as lead and mercury;

v. The stack to be located in the buffer area of the Montagne Jacquot Sewerage treatment plant with offices closer the residential and commercial zones;

vi. The provision of landscaping for green areas at the boundary between the site and residential/business/commercial areas;

vii. In addition to the provision of street lighting as proposed by the RDA, the proponent to provide for handrails for the security of the inhabitants of Camp Benoit;

viii. Ashes to be disposed of in appropriate mono landfill;

ix. Compliance with the conditions and requirements set down by all the agencies and authorities forming part of the EIA Committee;

x. Implementation of all measures proposed in the SEIA;

xi. Unrestricted access to enforcement agencies of the State to carry out surprise checks and for the collection of stack emissions for analysis.

SOUTH AFRICA 1

Harmony Gold Mining Co Ltd v Regional Director: Free State, Department Water Affairs and Forestry. Civil Case No 68161/2008
North Gauteng High Court South Africa (Makgoka, J)

Case Link

Introduction:

The High Court dismissed an application by the Harmony Gold Mining Company for the court to set aside a November 2005 directive by the department of water affairs under the National Water Act's anti-pollution section and thus Harmony Gold must continue paying for pumping and treating acid mine water in and around the Orkney gold mine.

Harmony Gold contended the directive no longer applied to it since they sold the mine to Pamodzi Gold Orkney in 2007 and was no longer the owner. Pamodzi went into provisional liquidation in 2009. The departmental directive forced Harmony and other companies mining in the Klerksdorp, Orkney, Stilfontein and Hartebeesfontein (Kosh) area of the North West province to share the costs of pumping and treating acid mine water. The directive was to remain in effect until the mining houses had reached an agreement on the long term management of mine water in the area, but an agreement that was never concluded.

Harmony approached the court for relief when the department refused to withdraw the directive. The company maintained the directive was unreasonable and constitutionally impermissible as there was no longer any link between them and the land or the pollution.

Legal Framework:

National Water Act 36 of 1998 section 19, 72

Constitution of the Republic of South Africa Act 108 of 1996

National Environmental Management Act 107 of 1998 section 2, 24, 28

Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Management, Mpumalanga Province and others (CCT67/06) [2007] ZACC 13; 2007

Held:

Judge Makgoka said the directive was issued when Harmony owned the land. "The applicant's mining activities polluted and contributed to the pollution of the underground water in the Kosh area," he said. The applicant derived financial benefit from its pollution activities. Without fully complying with the directive, and while the obligations in terms of the directive remained unfulfilled, the applicant disposes of its entire issued share capital to Pamodzi in August 2007. It is therefore not correct that the applicant is obliged to take responsibility for others' contribution to the pollution." The Judge said Harmony's interpretation of the Act would lead to a glaring absurdity in that a landholder who caused pollution through his activities could escape his obligations by simply disposing of the land.

SOUTH AFRICA 2

Wraypex Pty Ltd v Barnes and others (25173/05, 30729/05, 32648/05, 32649/05) [2011]

North Gauteng High Court South Africa (Stanley Sapire. AJ)

Case Link

Introduction:

The suit arose from green opposition to the now-completed Blair Atholl, the 330-house luxury estate, golf course and hotel development northwest of Johannesburg, which includes the Gary Player golf estate. The estate borders the Cradle of Humankind world heritage site and the Rhenosterspruit Conservancy. Wraypex, developer of the golf estate, accused the four residents of the area and members of the Rhenosterspruit Conservancy of publishing false and malicious statements concerning the company and alleged that it was done wrongfully with the intention to injure the firm. Wraypex said the statements made to authorities delayed the necessary statutory approvals and, as a result of the delays, the developer suffered damages including the costs of finance and contractual penalties.

Legal Framework:

Constitution of South Africa 1996 section 24

African Charter on Human and Peoples' Rights 1981 (Banjul Charter) Article 24

Declaration of the United Nations Conference on the Human Environment 1972 (Stockholm Convention) Principles 1-26.

Held:

Judge Stanley Sapire stated Wraypex failed on all four claims of defamation and damages it had launched against Rhenosterspruit Nature Conservancy members. He said the suit was “vexatious litigation” and confirmed that it could be labelled as a Slapp (Strategic Litigation Aimed against Public Participation) suit, one of the first in South Africa. This is when developers threaten civil litigation against environmental activists and civil society organisations in order to silence critics and burden them with legal costs until they abandon their criticism. The defamation action was "purposeless from an economic point of view" and that even if the company had won its case, it could not in good faith have expected more than an "infinitesimal fraction" of the R170m it claimed. The costs judgment recognized the idea of "Slapp" litigation and awarded punitive costs against the developer.

SOUTH AFRICA 3

SA Predator Breeders Association v Minister of Environmental Affairs (72/10) [2010] ZASCA151
Supreme Court of South Africa Justices JA (SNYDERS, BOSIELO, SHONGWE JJA AND R PILLAY AJA)

Case Link

Introduction:

The Supreme Court of Appeal held that the Minister of Environmental Affairs had acted irrationally when making the decision that captive-bred lions had to fend for themselves in an extensive wildlife system for 24 months before they could be hunted. The Court held that the inclusion of lions within the definition of a "listed large predator" would render the prohibition in the Threatened or Protected Species Regulations (GNR 152 of 23 February 2007) against the hunting of captive bred large predators within 24 months of their release invalid.

Legal Framework:

National Environmental Management Biodiversity Act 2004 section 57, 97

The Convention on Biological Diversity 1993

Held:

The judge held that "It is by no means clear to me how either ethical hunting (whatever its limits may be) and fair chase fit into a legislative structure which is designed to promote and conserve biodiversity in the wild, and, more especially in relation to captive-bred predators that are not bred or intended for release into the wild". He also held that regarding the prospects of success for the rehabilitation of captive-bred lions, on the expert evidence it appeared that "at worst a successful outcome was speculative, at best, very unlikely."

In 2008 the Minister amended the regulations to remove lions from their ambit so that, whilst legal proceedings took place, the balance of the regulations could be put into effect. At the time the Minister indicated that, if the judgment was in the Department's favor, lions would be re-introduced into the regulations, an option now no longer available to the Minister. The likely effect of this judgment is thus that the Department will have to substantially review its policy on so called "canned lion hunting" and if necessary seek amendments to the National Biodiversity Act

SOUTH AFRICA 4

HTF Developers (PTY) LTD v The Minister of Environmental Affairs and Tourism, The Member of The Executive Council of The Department of, Agriculture, Conservation and Environment, Gauteng ,DR S T Cornelius City of Tshwane Metropolitan Municipality Case number: 337/06
Justice(s): HARMS, BRAND, JAFTA, COMBRINCK JJA and MUSI AJA

Case Link

Introduction:

The appeal is against an order of Murphy J in the Pretoria High Court dismissing an application by the appellant ('HTF') for a declaration of rights and the setting aside of a directive made in terms of s 31A of the Act.

The applicant is the registered owner of the property described as the remaining extent of Erf 232 Riveira, District of Pretoria. The property falls within the area of jurisdiction of the City of Tshwane Metropolitan Municipality After the applicant purchased and took transfer of the property in March 2005, it applied to the fourth respondent for permission to divide the property into 12 subdivided portions. On 8 June 2005 the

Department of Housing, City Planning and Environmental Management of the fourth respondent confirmed in writing that the fourth respondent had in terms of the provisions of section 92(2) of the Town Planning and Townships Ordinance, 1986 (Ordinance 15 of 1986) approved the application for subdivision subject to certain conditions set out in an annexure to the letter of approval. The conditions are extensive and relate to the provision of services, electricity, sanitation and the like. Once it had received approval from the fourth respondent the applicant set about preparatory earthworks for the installation of pipelines and electrical infrastructure to service the subdivided portions with water, sewage and electricity services. It also proposes to develop access roads and needs to engage in site clearing for that purpose. On 18 July 2005, in response to complaints received from members of the public, the third respondent addressed a letter to the applicant. First stating the department was of the opinion that the applicant had undertaken an illegal activity in that it had begun clearing the property for the purposes of construction prior to receiving authorization from the Department

It set out the principles not applied by the applicant during the planning of the development, according to the Department, as:

- the disturbance of ecosystems and loss of biological diversity should be avoided, minimized or remedied;
- a risk averse and cautious approach be applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
- Environmental management must be integrated; acknowledging that all elements of the environment are linked and interrelated taking into account the effects of decisions and actions by pursuing the selection of the best practicable environmental option.

The letter secondly informed the applicant that after a site inspection conducted by its officials, the Department had established that most of the site is located on an untransformed ridge, considered to be a sensitive environment, characterized by high biodiversity and that the earthworks and infrastructural development have resulted in the disturbance of the sensitive ecosystems and a loss of biological diversity. The Department emphasized that many "red data" species of plants and animals inhabit the ridge, which because they are threatened require priority conservation efforts in order to ensure their future survival.

On 12 August 2005 the third respondent issued a directive in terms of section 31A of ECA directing the applicant to immediately cease with the clearing of the site and its construction activities and to design and implement a plan for the land's rehabilitation.

Legal Framework:

Environment Conservation Act 73 of 1989: s 21 and 31A, Schedule 1 of Regulation 1182

Conservation of Agricultural Resources Act 43 of 1983,

National Environmental Management Act 107 of 1998 section 2

Constitution of South Africa section 24

Held:

The ridges policy is compatible with the objectives and values of the constitutional environmental right and the principles of sustainable development and environmental assessment embodied in the legislative framework. The third respondent is entitled to apply that policy, provided he does so reasonably and fairly, when acting to protect the environment from harm and degradation under section 31A the applicant is not entitled to the relief it seeked and the application was dismissed.

TANZANIA 1

Felix Joseph Mavika v. Dar es Salaam City Commission Civ. Case No. 316 of 2000 High Court of Tanzania Dar es Salaam Justice(s): (Ihema J.)

Introduction:

The applicants in this case sought for an interim order order to restrain the Respondents, the Dar es Salaam City commission and Ilala Municipal Commission, from, inter alia, dumping solid and liquid wastes in a particular area because of pollution of the areas environment as well as endangering the health and lives of the applicants. Furthermore, they sought an interim order restraining the Respondents from using the abattoir located in the area for slaughtering of animals due to total disrepair as well as due to its vicinity to the dumping site and the use of polluted water from a water hole dug near the dumping site.

The respondents challenged the locus standi of the applicants. They contended that the matter before the court was a public right because the applicants were alleging public nuisance. Where public rights were at issue individuals had no right to represent individuals hence the applicants as individuals would have no locus standi in the matter before the court without the consent of the Attorney General. The applicants could be allowed to circumvent the law to enforce a public right and that the application was an attempt to fetter the statutory powers of the Attorney General.

Legal Framework:

Tanzania Civil Procedures Code CAP 33 Section 68 (c) and (e) and 95, order XXXVII Rule 1 and 2

The Constitution of the Republic of Tanzania Article 26(2)

Rio Declaration on Environment and Development 1992 Principle 10

Held:

The court analyzed the question of locus standi and concluded that the applicants did have standing. It based its decision on the Civil Procedure Code as well as the doctrine of public interest litigation enshrined in the Constitution. The applicants who were claiming to be affected by the action of the respondents in the dumping of liquid and solid wastes as well as failure to provide a healthy and clean environment certainly also had a cause of action against the respondent. Applicants could be heard on the matters raised in their depositing in asserting both a public right and or special damage likely to be suffered over and beyond the general public. In conclusion the court decided that the matter was properly before the court for trial of the issues presented.

Regarding the prayers for temporary injunction the court decided to defer making a decision on the prayers until the final determination of the suit was filed. The applicants had made similar assertions both in the affidavit and the plaint, assertions which needed to be verified at the trial.

UGANDA 1

Amooti Godfrey Nyakana v. Nema, Attorney General, Advocates Coalition for Development &Environment, Environment Alert, Greensward, Uganda Wildlife Society, The Environmental Action Network Constitutional Petition no.03/05 High Court of Uganda at Kampala

Justice(s): MPAGI-BAHIGEINE, A.E.; TWINOMUJUI, C.N.B; KITUMBA, C.K.; BYAMUGISHA, S.; KAVUMA, B.

Case Link

Introduction:

The petitioner is the proprietor of land Plantation Road Bugolobi, a Kampala suburban. He obtained the title in 2004 to construct a residential house on the plot. He obtained the necessary approvals and commenced the work. In June 2004 the first respondent through its inspectors carried out an inspection of Nakivubo wetland located in Nakawa Division. The inspectors found that the petitioner was constructing a house within a wetland. The first respondent issued a restoration order which was served on the petitioner's foreman on the 20th July 2004. The order required the petitioner to comply with the conditions stated therein within a period of 21 days.

He failed to do so and his unfinished building was demolished on 8th January 2005-hence this petition.

Legal Framework:

National Environment Management Act (Cap 153) Laws of Uganda sections 67, 68, and 70

Constitution of Uganda Articles 20,21, 24,26, 27, 28, 42, 44,45, 237 and 259

Held:

It was argued by Justice Mpagi-Bahigeine that the"wetlands could not be granted to private individuals/entities because the State holds such natural resources in trust for the citizenry and they must be preserved for the public benefit, in this case the environment". The petitioner is seeking to appeal against the judgment in the Supreme Court.

UGANDA 2

Advocates Coalition for Development and Environment (ACODE) v. Attorney General
Miscellaneous Cause No. 0100 of 2004
High Court of Uganda Kampala

Justice(s): Opio

Case Link

Introduction:

The Butamira Forest Reserve was established in 1929. In 1939 the Forest Reserve was leased to Kakira Sugar Works for a period of 32 years for the purpose of producing of firewood for the sugar company. However, they were denied the right to change the use of the use of the land from forest to plantation. In 1997 Kakira applied for permission to turn the Reserve into a plantation to the Forestry Department. Their request was granted. With this new permit but without undertaking an Environmental Impact Assessment, the company embarked on a scheme to clear the existing forest estate and replace it with sugar cane plantations.

The Local Community which depended on the forest for forest products and as a source of water complained and formed a pressure group in protest. They applied to this court seeking a declaration that, inter alia, the granting of a permit of Kakira by the first respondent contravened the Constitution of the Republic of Uganda and that the granting of the forest permit to Kakira amounted to the defacto degazetting the statutory obligations of the respondent when it permitted Kakira to occupy a forest reserve and change the land use without carrying out a full Environmental Impact assessment Study. It was also in violation of the applicants' rights to a clean and healthy environment and protection of the country's natural resources. They wanted an order to restore the environment and preserve the ecological integrity of the Forest Reserve.

Legal Framework:

Held:

The court emphasized that the application raised four issues for determination: Whether the applicants had standing in this matter; whether there was breach of the doctrine of public trust; whether the second respondent failed in its duties; and the remedies available to the parties. It was of the view that the applicants were clothed with legal standing to take the instant action under the Constitution on behalf of the people of Butamira and other citizens of Uganda. They were not busy bodies. Besides that, there was evidence that the permit was granted amidst protests from local communities which raised up a pressure group of over 1500 members who depended on the reserve for their livelihood through agro-forestry, and source of water, fuel and other forms of sustenance. There was therefore a breach of public doctrine. Politically and socially, Butamira Forest reserve belonged to the local community in Butamira. The people of Butamira also had a moral, cultural, economic and spiritual attachment to Butamira Forest Reserve as a source of sports, worship, herbal medicine, economy etc.

It was therefore not proper to deprive them without consulting them and conducting a proper study. Lastly in alienating the reserve the second Respond also failed in its constitutional duty to conserve the environment and natural resources equitably and for the benefit of both the present and future generations. In conclusion, the application was upheld with the orders prayed for.

UGANDA 3

Greenwatch vs. Uganda Wildlife Authority Miscellaneous Application No. 92 of 2004 High Court of Uganda Kampala Justice(s):Tinyinondi

Case Link

Introduction

The applicants in this case sought an order of temporary injunction against the respondents from exporting, transporting, removing or relocating any Chimpanzee from Uganda to the Peoples Republic of China or any other country in the world until the determination of the main application herein. The application followed press reports that officials of Government had already finalized plans to export Chimpanzees from their Sanctuary to Zoos in The Peoples' Republic of China.

The applicants argued that, among others, the export decision would fundamentally affect the Chimpanzees and in turn impact negatively on the environment. By removing Chimpanzees from their natural habitat and exporting them to China the respondents would violate the applicants' right to a clean and healthy environment as enshrined in the constitution. The applicants and all other citizens of Uganda could not enjoy a clean and healthy environment unless it had all its amenities including air, water, land and mineral resources, energy including solar energy and all plant and animal life. It was estimated that there were only 5000 Chimpanzees left in Uganda and therefore any further reduction in this number significantly affected the fauna component of the environment in Uganda.

The respondent contended that according to the relevant statutory provisions no court proceedings could be instituted until the expiry of forty-five days after written notice had been delivered to the respondent. No such notice as required in the Act was served on the respondent.

Legal Framework:

Held:

Referring to another judgment, the court agreed with the requirement that the respondent, usually the Government or a scheduled corporation, needed sufficient period of time to investigate a case intended to be brought against it so as to be able to avoid unnecessary expense on protracted litigation. However, this rationale could not apply to a matter where the rights and freedoms of the people were about to be infringed. The people could not afford to wait forty-five days before pre-emptive action was applied by the court. They needed immediate redress. To demand from an aggrieved party a forty-five days' notice was to condemn them to infringement of their rights and freedoms for that period which the court would not be prepared to do. Therefore, the preliminary objection by the respondent was overruled.

NIGERIA 1

Mr. Jonah Gbemre (for himself and representing Iwherekan Community in Delta State, Nigeria) v Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation and Attorney-General of the Federation (2005) AHRLR 151

Federal High Court of Nigeria Benin Justice(s): Nwokorie J.

Introduction:

The applicant, , claimed inter alia as follows: A declaration that the actions of the 1st and 2nd Respondents in continuing to flare gas in the course of their oil exploration and production activities in the Applicant's Community is a violation of their fundamental rights (including healthy environment) and dignity of human person guaranteed by the Constitution and reinforced by the African Charter on Human and Peoples Rights .The Applicant also sought a declaration that the continued flaring of gas in Nigeria as may be allowed under AGRA Regulations are inconsistent with the Applicant's right to life and/or dignity of human person enshrined in the Constitution.

The Applicant's grounds for bringing this application is that the burning of gas by flaring same in their community has given rise to the following: That is it;

(a) Poisons and pollutes the environment as it leads to the emission of carbon dioxide, the main greenhouse gas; the flares contain a cocktail of toxins that affects their health, lives and livelihood.

(b)Exposes them to an increased risk of premature death, respiratory illness, asthma and cancer;

(c) Contributes to adverse climate change as it emits carbon dioxide and methane which causes global warming of the environment, pollutes their food and water,

(d) Causes painful breathing, chronic bronchitis, decreased lung function and death;

(e) Causes acid rain, their corrugated house roofs are corroded by the composition of the rain that falls as a result of gas flaring… the acid rain consequently acidifies their lakes and streams and damages their vegetation.

Legal Framework:

Constitution of the Federal Republic of Nigeria, 1999 Sections 33(1) and 34(1)

African Charter on Human and Peoples Rights Articles 4, 16 and 24

Held:

The Federal High Court sitting in Benin City granted all the reliefs as prayed and ordered the Attorney-General of the Federal Republic of Nigeria to immediately set into motion, after due consultation with the Federal Executive Council, necessary processes for the enactment of a bill for an Act of the National Assembly for the speedy amendment of the relevant sections of the AGRA and the AGRA Regulations made thereunder to quickly bring them in line with the provisions of chapter 4 of the Constitution.

NIGERIA 2

Agbara et al. v. Shell Petroleum et al Suit No FHC/ASB/CS/231/2001
Federal High Court of Nigeria Asaba Justice(s): Buba, I.N.

Introduction:

The Ejama-Ebubu case was first filed in 2001, after Nigeria's transition to a civilian government. There has been a longstanding war of words between Shell and Ogoni groups over the Ejama-Ebubu spill, communities claim that Shell's negligence caused the rupture, while Shell blames retreating Biafran rebels, who supposedly blew up the pipeline as they withdrew during Nigeria's civil war. Yet at trial, according to presiding Justice Ibrahim Buba, it declined to call any evidence to support any of its factual defenses. When Shell repaired its facilities and started pumping oil again after the civil war was over, it did nothing to patch the leak, which continued to gush crude onto farmlands and into waterways for at least fifteen years. At its worst, the Ejama-Ebubu spill inundated several square miles of land under literally yards of oil. The land remains uninhabitable and ravaged to this day.

Legal Framework:

Rio Declaration on Environment and Development 1992 Principle 16

Held:

The Shell Corporation has been ordered by the Nigerian court to pay out a large sum of compensation for the oil spill that severely damaged Ogoni lands 40 years ago. The court also ordered the oil giants to de-pollute the land and swamps to their states before the spill took place.

NIGERIA 3

Morka and the Social and Economic Action Rights Centre v. Nigeria

ACHPR/COMM/A044/1

African Commission on Human & Peoples' Rights Banjul Justice: Dankwa

Introduction:

There was a Communication to the African Commission of Human & Peoples' Rights alleging that the military government of Nigeria had been directly involved in oil production through the State oil company, in a consortium with Shell Petroleum Development Corporation, and that these operations had caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni People living in the area. The Complainants alleged that the Nigerian government had violated the right to health and the right to clean environment as recognized under the African Charter. The government had directly participated in the contamination of air, water and soil and thereby harmed the health of the Ogoni population, had failed to protect the Ogoni population from the harm caused by the Shell Consortium but had instead used its security forces to facilitate the damage and failed to provide studies of environmental and health risks caused by the oil operations.

Legal Framework:

African Charter on Human and Peoples Rights Articles 2, 4, 14, 16, 18(1), 21 and 24

Held:

The Commission noted that the right to a healthy environment, as guaranteed under Article 24 of the African Charter, imposed clear obligations upon a government. Undoubtedly, the government of Nigeria had the right to produce oil. But the care that should have been taken and which would have protected the rights of the victims of the violations complained of was not taken. To exacerbate the situation, the security forces of the government engaged in conduct in violation of the rights of the Ogonis by attacking, burning and destroying several Ogoni villages and homes.

Among others, the Nigerian Government had given the green light to the oil Companies to devastatingly affect the well-being of the Ogonis. Its practice was in violation of the African Charter. The government's treatment of the Ogonis had also violated all three minimum duties of the right to food. The government had destroyed food sources through its security forces and State Oil Company; had allowed private oil companies to destroy food sources; and, through terror, had created significant obstacles to Ogoni communities trying to feed themselves.

The commission found the Federal Republic of Nigeria in violation of Articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter on Human and Peoples' Rights. It appealed to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland, to ensure that appropriate environmental and social impact assessments were prepared for any future oil development, that the safe operation of any further oil development was guaranteed, and to provide information on health and environmental risks to communities likely to be affected by oil operations.

CANADA 1

Cold Lake First Nations v. Alberta (Energy Resources Conservation Board) 2012 ABCA 304

Court of Appeal of Alberta

Berger, R. J.

Case Link

Introduction:

Osum Oil Sands Corporation (Osum) applied to the Alberta Energy Resources Conservation Board (ERCB) for approval of a bitumen recovery scheme near Cold Lake, Alberta. The Cold Lake First Nation (CLFN) objected to Osum's application and filed a Notice of Question of Constitutional Law, asking the ERCB to determine whether Alberta had discharged its duty to consult and accommodate the CLFN with respect to Osum's project. The CLFN took the position that Alberta had not met its duty and, therefore, the project was not in the public interest.

The ERCB decided that, while it has the power to decide constitutional questions, it does not have the jurisdiction to answer every constitutional question posed to it. In this case a member of industry, and not the Crown, was the applicant. The ERCB concluded that its mandate to review Crown consultation with respect to Aboriginal and treaty rights does not extend to circumstances where the proponent is not the Crown or an agent of the Crown. The following day, the CLFN reached an agreement with Osum and withdrew its objection to Osum's project. Despite reaching an agreement with Osum, the CLFN sought leave to appeal the ERCB's decision to the Alberta Court of Appeal.

Legal Framework:

Administrative Procedures and Jurisdiction Act RSA 2000

Schedule 1 of the Designation of Constitutional Decision Makers Regulation 69/2006

Kelly v Alberta (Energy and Utilities Board) 2008 ABCA 52, [2008] A.J No. 127 at para 17

Paul v British Colombia (Forest Appeals Commission), [2003] 2 .S.C.R 585 at para 36

Held:

While the Court agreed that the question of whether the Crown has met its duty to consult was clearly an issue in the public interest, it decided that it wouldn't exercise its discretion to answer the CLFN's question. The Court noted that consultation between the CLFN and other First Nations and government is ongoing. Given this, the Court felt that there would likely be a matter that engages the same question in the near future. To emphasize this point, the Court appended to its decision similar notices of constitutional questions from the Athabasca Chipewyan First Nation and the Fort McMurray First Nation to be heard by the Canadian Environmental Assessment Agency's and ERCB's Joint Review Panel in Shell's Jackpine mine expansion on October 23, 2012. The Court further highlighted that it is generally hesitant to decide important constitutional questions in a factual vacuum, specifically noting that jurisdictional questions cannot always be divorced from the underlying factual matrix. Based on this concern and others, the Court declined to grant leave.

CANADA 2

Wahgoshig First Nation v Her Majesty the Queen in Right of Ontario and Solid Gold Resources Corp 2011 ONSC 7708

Ontario Superior Court of Justice,

Justice Brown, C.J.

Case Link

Introduction:

Wahgoshig holds and exercises Aboriginal and treaty rights throughout its traditional territory on the lands in and around Lake Abitibi. In November 2007, Solid Gold staked mining claims in the lands surrounding Lake Abitibi. In July 2009, Ontario advised Solid Gold that it should contact Wahgoshig to engage in consultation regarding its intended mineral exploration. Neither Ontario nor Solid Gold consulted with Wahgoshig prior to the commencement of Solid Gold's drilling operations in the spring of 2011. Following the commencement of drilling operations, Wahgoshig contacted Solid Gold in an attempt to foster consultation. On November 8, 2011, Ontario again advised Solid Gold that it must consult with Wahgoshig. Solid Gold made no attempt to consult with Wahgoshig and continued its exploration activities

On November 9, 2011, Wahgoshig served a Notice of Claim on Ontario pursuant to the Proceedings Against the Crown Act and initiated this motion for an interlocutory injunction. Ontario Superior Court held that it had jurisdiction to grant the relief requested.

While Wahgoshig had not yet commenced an action, it had served a Notice of Claim and would serve a statement of claim on the expiration of the notice period.

Legal Framework:

Constitution Act, 1982 (“Section 35”)

RJR MacDonald Inc. v. Canada

Frontenac Ventures Corp. v Ardoch Algonquin First Nation

Mining Act R.S.O. 1990, c. M. 14

Held:

The Court held, it constituted an intended action and was within the contemplation of Rule 40.01 of the Rules of Civil Procedure. The Court applied the tripartite test for granting injunctive relief outlined by the Supreme Court in RJR MacDonald Inc. v. Canada. On the issue of a serious question to be tried, the Court rejected Solid Gold’s reliance on the Ontario Court of Appeal’s ruling in Frontenac Ventures Corp. v Ardoch Algonquin First Nation, holding that in Frontenac the Court was not facing a constitutional challenge to the Mining Act. The Court also recognized that, since the ruling in Frontenac, the Ontario government had amended its legislation to promote reconciliation between project proponents and First Nations. The Court held that Wahgoshig’s claim was not frivolous or vexatious and thus, the first branch of the RJR-MacDonald test was met.

The Court went on to reject Solid Gold’s submission that the applicant failed to demonstrate proof of actual irreparable harm which could not be compensated by damages. The Court found that certainty of irreparable harm is not always required and that such certainty may not be possible where the duties to consult and accommodate have not been met there is often a lack of knowledge about the impacts of a project. Further, the Court recognized developments in the case law which have recognized that negative effects on Aboriginal and treaty rights and restrictions on the ability to exercise such rights in their preferred manner or location in itself constitutes irreparable harm. The Court also reaffirmed existing jurisprudence which has held that the mere lost opportunity to be meaningfully consulted and to obtain accommodation for impacts constitutes irreparable harm which cannot be compensated by damages. Accordingly, the second branch of the RJR- MacDonald test was met.

The Court also found the balance of convenience in this case to favour the applicant. The Court agreed that refusing to enjoin Solid Gold from its activities would send a message that Aboriginal and treaty rights, including the right to be consulted and accommodated, could be ignored by exploration companies. This, the Court held, would not be in the public interest.

Solid Gold was enjoined from carrying on any further exploratory activity on the lands in question for 120 days from the date of the decision. During the injunctive period, Solid Gold, Wahgoshig and Ontario were to enter into a process of bona fide, meaningful consultation and accommodation. Should this process fail to be productive, Wahgoshig was entitled to seek an extension of the injunction. The Court also dispensed with the requirement for an undertaking for damages as requested by the applicant.

CANADA 3

Minister of Fisheries and Oceans and the Minister of the Environment v. David Suzuki Foundation 2012 FCA 40

Federal Court of Appeal Ottawa

Sharlow, K.; Mainville, R.M.; Nadon, M

[Case Link]

Introduction:

Resident killer whales occupied the waters off the West Coast of British Columbia in two distinct populations. The whales were at risk due to their low reproductive rate, small population and exposure to a variety of human-caused threats. The first application by a group of nine non-profit environmental organizations sought to challenge a Protection Statement issued by the Minister of Fisheries and Oceans pursuant to s.58(5)(b) of the Species at Risk Act, S.C. 2002, c. 29 ("SARA"). The second application challenged a Protection Order by the Minister of Fisheries and Oceans and the Minister of the Environment which sought to limit the scope of an earlier Protection Order such that it applied only to geospatial areas or geophysical attributes of the critical habitat.

The court ruled that the Department of Fisheries and Oceans must legally protect all aspects of killer whale critical habitat including their food supply and the quality of their marine environment. DFO appealed that decision, claiming that discretionary provisions in the Fisheries Act adequately protect the critical habitat of aquatic species such as the killer whale. The Act however, does not make critical habitat protection mandatory, as is the case under SARA. Instead, the Fisheries Act gives the Minister broad discretion to authorize activities that destroy habitat. The Federal Trial Court made findings with respect to protection statements and protection orders which apply to aquatic species under SARA. The appeal only dealt with the decision regarding protection statements. The appeal focused on the issue of whether the government can rely upon other legislation to protect critical habitat of aquatic species if that legislation provides the government with the discretion to authorize harm to that habitat.

The Trial Court had held that any protection provided by other federal instruments must be a legal protection and equivalent to the protection provided under SARA, and that an analysis of that equivalency must include consideration of what the relevant legislation allows in terms of permitting harm to the critical habitat. Thus, any instrument to be relied on instead of SARA must 1) prohibit the destruction of the critical habitat, and 2) must not grant discretion to the relevant ministry to allow for the destruction of that habitat, unless that discretion is limited in the same manner as SARA's permitting provisions. Because of the discretion given to the government to authorize harm to habitat or deposits of deleterious substances under the Fisheries Act, it could not act as a "surrogate" to protect the critical habitat of the Killer Whale.The DFO made two arguments on the substance of the Appeal, both of which were rejected. First, the DFO argued that while the Fisheries Act does allow for discretion to authorize harm, the Minister would not actually exercise this discretion to lessen the protection of the Killer Whale.

Legal Framework:

Species at Risk Act, S.C, 2002, c. 29 ("SARA")

Fisheries Act, R.S.C. 1985, c. F-14

Committee on the status of Endangered Wildlife in Canada ("COSEWIC")

Held:

The Court held that there was no way that it could meet the requirement in SARA for legal protection as the Minister could change his mind and exercise discretion under the Fisheries Act to destroy critical habitat. Second, the DFO argued that SARA itself allows for flexibility in the manner in which activities which affect critical habitat can be authorized. In considering this argument, the Court reviewed the permitting provisions in SARA to determine what impacts the government can allow with respect to critical habitat. The Court went on to find that SARA's protection of critical habitat is non-discretionary and compulsory. It also held that critical habitat of aquatic species "cannot be destroyed or detrimentally affected through a permit or other authorization issued in application of section 74 or 77 of SARA".

The Court went even further, concluding that a textual, contextual and purposive analysis of SARA shows that Parliament "is precisely seeking to avoid the destruction of identified critical habitat of listed endangered and threatened aquatic species through any means, including through activities authorized under discretionary permits or licences".

The appeal is allowed in part, declaration 1(d) of the Federal Court's judgment is quashed in part, and it is replaced by the following declaration: Ministerial discretion does not legally protect critical habitat within the meaning of section 58 of the Species at Risk Act, and it was unlawful for the Minister to have cited provisions of the Fisheries Act in the

Killer Whales Protection Statement where such provisions are subject to ministerial discretion. The costs of this appeal are awarded to the respondents.

CANADA 4

Middlesex-Lambton Wind Action Group Inc. v. Director, Ministry of the Environment
No. 11-208
Environmental Review Tribunal Ontario

Carter-Whitney, M.; Muldoon, P.; Valiante, M

Case Link

Introduction

The issue arose in an appeal to the Environmental Review Tribunal (ERT) by the Middlesex-Lambton Wind Action Group of a Renewable Energy Approval (REA) issued to Zephyr Farms Limited for a wind farm under the Environmental Protection Act. In its appeal, the Appellant alleged that the proposed wind farm would negatively affect the health of the surrounding community. In pre-hearing disclosure, the Appellant listed numerous witnesses aiming to testify that they had suffered negative health effects caused by living in the vicinity of wind turbines. The Appellants provided no corresponding medical reports to substantiate, further explain, or allow professional medical scrutiny against, these statements.

In response, the Ministry of the Environment (MOE) requested an order for the Appellants to produce medical reports to corroborate the allegations. The MOE argued that, without medical reports properly subjected to medical scrutiny, the ERT did not possess the necessary expertise to judge how relevant, applicable and transferable the witnesses' experiences would be to Zephyr Farms' proposal. Consequentially, the MOE claimed that layperson evidence would be of little use in determining whether the Zephyr Farms project will cause serious harm to human health.

Legal Framework:

Environmental Protection Act

Environmental Bill of Rights 1993

Held

The ERT agreed with the MOE and found that the ERT cannot simply accept the assertion of a layperson that they suffer from a certain medical condition, let alone the cause of that condition. Such conclusions require the diagnostic skills of a qualified health professional. Accordingly, the ERT would only be willing to hear and consider the subjectively reported symptoms of such a witness. The ERT also refused to grant an adjournment because the Appellant knew of the time constraints on REA appeals when it filed its Notice of Appeal and was unable to provide any viable explanation for its inability to obtain a single medical record for any of the witnesses it proposed to call. Following the decision, the Appellants withdrew their appeal to the ERT.

CANADA 5

Smith v. Inco Limited 2011 ONCA 628
Ontario Court of Appeal

Doherty, MacFarland and Hoy

Case Law

Introduction:

The causes of action alleged in this case involved private nuisance and a cause of action founded on the rule in Rylands v. Fletcher, a seminal decision of the House of Lords, which enables a finding of strict liability for damage caused to one property, by the “escape” from another property of a substance “likely to cause mischief,” in circumstances where there has been a “non-natural” use of the land.

Inco Limited (Inco) operated a nickel refinery in Port Colborne, ON from 1918 to 1984. During that time, waste product was emitted into the air from a 500-foot smoke stack, mostly in the form of nickel oxide. Nickel oxide was subsequently found in the soil of neighbouring residential properties. Beginning in 2000, 16 years after the refinery had closed; concerns about the level of nickel in the soil began to surface and caused widespread public concern and controversy. A class of approximately 7,000 neighbouring property owners contended, and the trial judge agreed, that the public concern had resulted in their property values not increasing at the same rate as comparable properties. The trial judge awarded $36 million in damages after holding Inco liable in both private nuisance and under the rule in Rylands v. Fletcher.

Legal Framework:

Environmental Protection Act, R.S.O. 1990, c. E.19, s. 99.

Rylands v. Fletcher (1866)

Royal Anne Hotel Co. v. Village of Ashcroft, [1979]

Held:

A unanimous Court of Appeal allowed Inco’s appeal and set aside the trial judgment, determining that the claimants had failed to establish Inco’s liability under either private nuisance or the rule in Rylands v. Fletcher, and in any event, the claimants had suffered no loss. The Court of Appeal determined that a chemical change in the content of soil, without more, does not amount to physical damage to property as alleged by the claimants. To succeed in their nuisance claim, the claimants were required to show either that nickel at any level posed a risk, or that the nickel levels present were above the levels at which there was a risk to human health and wellbeing. The evidence had failed to establish either point. With respect to the rule in Rylands v. Fletcher, the Court of Appeal found that Inco’s operation of the refinery was not a “non-natural” use of its property. Inco operated the refinery in an industrial part of the city and did not create any risks beyond what would be expected of an industrial operation. Although compliance with environmental and zoning regulations is not a defence to a Rylands v. Fletcher claim, the Court of Appeal clarified that it is an important consideration to be taken into account.

CANADA 6

Nlaka'pamux Nation Tribal Council v. British Columbia (Environment Assessment Office), 2011 BCCA 78

Court of Appeal Vancouver Justice(s): Smith, D.; Groberman; Rowles

Case Law

Introduction:

A proposed landfill extension would occupy land over which the Nlaka'pamux First Nation claimed Aboriginal rights and title. The proposal was subject to an assessment under the Environmental Assessment Act. Section 11 required the Project Assessment Director to determine the scope and the procedures by which the assessment would occur. The original s. 11 order did not provide for any consultation with the Nlaka'pamux Nation Tribal Council (NNTC). The NNTC objected. The amended order did not specifically mention the NNTC, but provided for discretionary consultation with Aboriginal entities. The NNTC claimed that it had a right to be consulted before the scope of the assessment was established, and sought judicial review. The NNTC requested a declaration that the Crown, through the Environmental Assessment Office, failed to comply with its duty of consultation and also sought to quash orders and approvals granted in the assessment process.

Legal Framework

Environmental Assessment Act, S.B.C. 2002, c. 43

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43 (CanLII)

Held:

The British Columbia Supreme Court, in a decision reported at [2009] B.C.T.C. Uned. 1275, dismissed the petition, finding that the Environmental Assessment Office had acted reasonably in undertaking consultations with the NNTC. The NNTC appealed. The British Columbia Court of Appeal allowed the appeal to the extent of declaring that the Project Assessment Director's amended order failed to adequately establish the necessary processes of consultation with the NNTC, and was, in that respect, defective. The court did not accede to the other relief claimed by the NNTC. In particular, the court refrained from quashing the amended order, as the court found that it was "no longer in play".

CANADA 7

The Corporation of the City of Kawartha Lakes v. Director, Ministry of the Environment 2012 ONSC 2708

Ontario Divisional Court Justice(s): Whalen, Sachs and Herman.

Case Link

Introduction:

In late 2008, several hundred liters of furnace oil leaked from a basement of a property located in the City. The property owner's insurance company retained a consultant to begin remediation, during which it was discovered that furnace oil had entered into the City's municipal storm sewer system and culverts, and was being discharged into Sturgeon Lake. The consultant notified the Ministry of the Environment, and the Ministry, in turn, ordered the property owner to eliminate adverse effects caused by the spill and to restore the natural environment.

By March 2009, the property owner's insurance coverage became insufficient to cover any clean-up efforts beyond the property boundary. By then, the property itself had sufficiently been remediated but contamination on the City's property still had the potential to impact Sturgeon Lake. Accordingly, in late March 2009, the Ministry issued an order against the City to take all reasonable steps to prevent discharge of the contaminant from its property. The City requested a review of this order by the Director who then confirmed the order on April 9, 2009.

Legal Framework:

Environmental Protection Act, R.S.O. 1990, c. E.19

Statutory Powers Procedure Act, R.S.O. 1990

Montague v. Ontario (Ministry of the Environment) (2005)

Held

At the Tribunal level, the City unsuccessfully tried to argue that the clean-up order should not have been issued against an innocent party because it was unfair and contrary to the "polluter pays" principle. In November 2009, the Tribunal granted the property owner's motion which prevented the City from leading evidence relating to the parties' fault and the reasonableness of any costs incurred in remediating the spill. The Tribunal heard the City's appeal in April 2010 and dismissed the case in July 2010. It found that the Act clearly contemplates some potential unfairness to innocent owners by "saddling" them with initial liability to carry out remediation. In the context of a migrating contaminant on the City's property, the appropriate action under the Act is for the City to take immediate measures to safeguard Sturgeon Lake and to leave questions about ultimate financial liability to another forum. The Ministry did not need to be satisfied that reimbursement to the City would be guaranteed before acting and, therefore, the clean-up order was sensible within this context.

By the time the City's appeal of the Tribunal's decision reached the Divisional Court in April 2012, it was moot as the City had already completed remediation in accordance with the clean-up order out of public interest. Both the City and the Ministry urged the Court to hear the appeal to help give guidance for future situations. The Divisional Court found that the Tribunal did not err.

CANADA 8

MiningWatch Canada v. Canada (Minister of Fisheries and Oceans) 2010 SCC 2 Supreme Court Justice(s): Binnie, LeBel, Fish, Abella, Charron, Rothstein and Cromwell

[Case Link]

Introduction:

In order to develop a copper and gold open pit mining and milling operation in British Columbia, a mining company submitted a project description to the BC Environmental Assessment Office. Public comment was sought and the Office subsequently determined that the project was not likely to cause significant adverse, environmental, heritage, social, economic or health effects and issued a provincial environmental assessment certificate. The company also submitted to the federal Department of Fisheries and Oceans applications for dams required to create a tailings impoundment area. Initially, the Department stated that a comprehensive study was required because the project fell within the provisions of the Comprehensive Study List Regulations (CSL) promulgated under the Canadian Environmental Assessment Act (CEAA). It subsequently scoped the project as to exclude the mine and mill and, given this, concluded that a comprehensive study was no longer necessary and that the assessment would proceed by way of screening. Additional public comment was not sought and the screening instead relied on information collected through the cooperative federal/provincial environmental assessment process. The federal screening report concluded that the project was not likely to cause significant adverse environmental effects and the responsible authority made the decision to allow the project to proceed.

Mining Watch filed an application for judicial review of the decision to conduct a screening rather than a comprehensive study. The Federal Court allowed the application, concluding that the responsible authority had breached its duty under the CEAA by scoping the environmental assessment so that it only required a screening. The Federal Court of Appeal set aside the decision.

Legal Framework:

Environmental Protection Act, R.S.O. 1990

Canadian Environmental Assessment Act, S.C. 1992

Federal Courts Act, R.S.C. 1985

Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans), [2000] 2 F.C. 263;

Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans), 2006 FCA 31, [2006]

Held:

The Supreme Court held appeal should be allowed. The CEAA and regulations require that the environmental assessment track be determined according to the project as proposed; it is generally not open to a responsible authority to change that level. An interpretation which provides that the word 'project' in s. 21 of the CEAA means 'project as proposed' by the proponent, rather than 'project as scoped' by the responsible authority, is consistent with the statutory definition of that word in s. 2 of the CEAA, and with Parliament's intent as found in the respective roles of the responsible authority and the Minister in conducting environmental assessments under the CEAA. Where, as here, a project as proposed is listed in the CSL, the requirements in s. 21 are mandatory.

The responsible authority or Minister cannot reduce the scope of the project to less than what is proposed by the proponent. In the present case, the federal environmental assessment should have been conducted for the project as proposed by the proponent. Since the proposed project was described in the CSL, the requirements of s. 21 applied. The responsible authority was free to use any and all federal provincial coordination tools available, but it was still required to comply with the provisions of the CEAA pertaining to comprehensive studies. By conducting a screening, the responsible authority acted without statutory authority.

In exercising his discretion to grant the relief he did, the trial judge did not take account of a number of relevant and significant considerations and granted broader relief than was appropriate. Mining Watch has brought this judicial review as a test case of the federal government's obligations under s. 21. They made a strategic decision not to challenge the substantive scoping decision. When all the relevant considerations are taken into account, the appropriate relief is to allow the application for judicial review and declare that the responsible authority erred in failing to conduct a comprehensive study. The focus of Mining Watch's interest as a public interest litigant is the legal point to which the declaration will respond and there is no justification in requiring the proponent of the project to repeat the environmental assessment process when there was no challenge to the substantive decisions made by the responsible authority.

CANADA 9

Municipality of Crowsnest Pass v. Director Southern Region, Environmental Management, Alberta Environment 2008-016-R (A.E.A.B.)
Alberta Environmental Appeals Board

Case Link

Introduction:

Alberta Environment refused to issue a water licence under the Water Act to the Municipality of Crowsnest Pass for a water well located near the community of Sentinel, Alberta. The reason Alberta Environment refused to issue the licence was a possible connection between the proposed well and Crowsnest Lake or other surface water sources. Alberta Environment has placed a reservation on all surface water and groundwater that naturally flows to and from surface water sources, in most of southern Alberta, the effect of which is to limit the issuance of new water licences from such sources.

Legal Framework:

Environmental Protection and Enhancement Act, R.S.A. 2000,

Water Act, R.S.A. 2000,

Held:

Following a hearing, the Board concluded the water being requested under the licence was reserved water and, therefore, the Board recommended to the Minister that the Director's decision be upheld. Based on the evidence and data provided, significant uncertainty remained as to whether the water applied for was hydraulically connected to surface water. The purpose of the reservation in the South Saskatchewan, Oldman, and Bow river basins is to protect and conserve water for downstream water users and future users. Given the absence of compelling site-specific data that could demonstrate with a greater degree of certainty that the aquifer is not connected to a surface water body, the Board applied the precautionary principle. The water applied for was, therefore, reserved water, and the Board recommended no licence should be issued.

CANADA 10

Maynes v. British Columbia (Environment) 2009 BCSC 1066
Supreme Court New Westminster Justice(s): Gropper.

Case Link

Introduction:

Dennis Maynes is a falconer. On November 1, 2007, a conservation officer for the Ministry attended at Mr. Maynes' commercial premises. Mr. Maynes admitted to working with the raptors without a permit authorizing him to possess, transport, and traffic the birds and the birds were seized. Mr. Maynes applied to Provincial Court for the return of his confiscated birds under s. 97.6 of the Act. His application was refused on September 22, 2008. The trial judge held that Mr. Maynes did not have a permit, without which he was not "lawfully entitled to the wildlife". Mr. Maynes appeals from that decision in accordance with s.

97.6(5), accepting that he requires a permit for the eagle and one of the falcons: the peregrine falcon, but maintaining that the remainder of the confiscated birds (three Harris hawks and a hybrid falcon) are non-indigenous, domestically bred birds that fall outside the jurisdiction of the Act and its requirement for compliance with the Regulations.

Legal Framework:

Wildlife Act, RSBC 1996 c. 488,

Wildlife Act Permit Regulation, B.C. Reg. 253/2000

Held:

The Court held: The definition of "raptors" in s. 1, which includes hawks and falcons, clearly applies to the confiscated birds of which Mr. Maynes seeks the return. As the definition of "wildlife" in s. 1 clearly includes raptors, it follows that hawks and falcons are wildlife, as that term is used under the Act. As per ss. 2(1) and (2), ownership in all wildlife in British Columbia is vested in the Crown and a person does not acquire a right of property in any wildlife except in accordance with a permit or licence issued under the Act. Thus, it is illegal for a person to have wildlife in his or her possession in B.C., other than as authorized under a licence or permit, or as provided by regulation. As Mr. Maynes does not hold a valid permit or licence, he has no legal entitlement to the confiscated birds.

CANADA 11

Alberta Wilderness Association v. Minister of Environment 2009 FC 710
Federal Court Vancouver Justice(s): Russel W. Zinn

Case Link

Introduction:

In Sage Grouse, the Federal Court allowed the judicial review application of a coalition of environmental groups challenging the decision of the Minister of Environment to refuse to identify critical habitat in the Greater Sage Grouse Recovery Strategy, posted January 14 2008. The recovery strategy identified requirements for four types of habitat: breeding, nesting, brood-rearing and winter. The Minister concluded that, based on the available scientific evidence, no critical habitat could be identified with respect to any of these requirements. The facts, however, showed that critical habitat was identifiable for three of the four habitat types.

Legal Framework:

Species at Risk Act, S.C. 2002, c. 29 ("SARA")

COSEWIC (the Committee on the Status of Endangered Wildlife in Canada)

Bergen Ministerial Declaration on Sustainable Development in 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), 2001 SCC 40.

Held:

The Court agreed with the applicants that the Minister must identify as much critical habitat as possible in a recovery strategy, even if all critical habitat cannot be identified at the time the Ministry is developing the recovery strategy. In particular, the Court noted that the Ministry of Environment appeared to be seeking precision rather than using best available information in identifying critical habitat. While that information may change over time, the identification of critical habitat cannot be postponed for that reason alone. The court refused to find an error of law; however, it did conclude that the Minister's decision not to identify any critical habitat, despite such habitat being known, was unreasonable.

The Court ordered the Minister to remedy the critical habitat provision in the recovery strategy, and invited the applicants to make submissions on that point. The applicants argued for a redetermination of critical habitat on the basis of the judgment and additional scientific information provided since the initial judgment. However, the court agreed with the respondent Minister that the recovery strategy need only be updated to correct the deficiencies originally found by the Court, i.e., to identify as critical habitat all known active breeding sites in Alberta and Saskatchewan, and known source habitat within the Manyberries area.

CANADA 12

Friends of the Earth v. Canada (Governor in Council) 2008 FC 1183
Federal Court Vancouver Justice(s): Barnes.

Case Link

Introduction

These were three applications for judicial review each seeking declaratory and mandatory relief in connection with a succession of alleged breaches of duties said to arise under the Kyoto Protocol Implementation Act (KPIA).

The KPIA, which was introduced to Parliament as a private member's bill, was not supported by the government, which explains why it embodies a legislative policy that is inconsistent with stated government policy (that Canada would not comply with Kyoto Protocol targets). The KPIA imposes a number of responsibilities upon the Minister and the Governor in Council (GIC), such as the requirement that a Climate Change Plan be prepared describing "the measures to be taken to ensure that Canada meets its [Kyoto] obligations." The Climate Change Plan submitted by the government made it very clear that it had no present intention of meeting its Kyoto Protocol commitments.

The issues were whether (1) the applicant had standing to bring these applications, (2) section 5 of the KPIA imposed a justiciable duty upon the Minister to prepare and table a Climate Change Plan that is Kyoto compliant, and (3) sections 7, 8 and 9 of the KPIA imposed justiciable duties upon the GIC to make, amend or repeal environmental regulations within the timelines therein stated.

Legal Framework:

Kyoto Protocol Implementation Act, 2007, c. 30, 5, 6, 7, 8, 9, 10 and 10.1 (KPIA)

The Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998)

Held:

The Federal Court held the applications should be dismissed. The issue of the applicant's standing was to be resolved solely on the basis of the justiciability of the substantive issues it raised. The justiciability of these issues was a matter of statutory interpretation directed at identifying Parliamentary intent: in particular, whether Parliament intended that the statutory duties imposed upon the Minister and upon the GIC by the KPIA be subjected to judicial scrutiny and remediation.

While the failure of the Minister to prepare a Climate Change Plan may well be justiciable, as evidenced by the mandatory term "shall" in section 5 of the KPIA, an evaluation of its content is not. The word "ensure" found in section 5 and elsewhere in the KPIA is not commonly used in the context of statutory interpretation to indicate an imperative. The Act also contemplates an ongoing process of review and adjustment within a continuously evolving scientific and political environment. These are not matters that can be completely controlled by the Government of Canada such that it could unilaterally ensure Kyoto compliance within any particular timeframe. As paragraph 5(1)(f) allows for a failure to implement any of the required remedial measures for ensuring Kyoto compliance in a given year, it is implicit that strict compliance with the Kyoto emission obligations in the context of any particular Climate Change Plan is not required by section 5. It would be incongruous for the Court to be able to order the Minister to prepare a compliant Plan where he has deliberately and transparently declined to do so for reasons of public policy.

That the words “to ensure” used in section 5 reflect only a permissive intent is also indicated by the use of those words in section 7 dealing with the authority of the GIC to pass, repeal or amend environmental regulations. If section 7 of the KPIA does not create a mandatory duty to regulate, it necessarily follows that all of the regulatory and related duties described in sections 8 and 9 of the KPIA are not justiciable if the GIC declines to act. If the government cannot be compelled to regulate, it cannot be required to carry out the ancillary duties of publishing, reporting or consulting on the efficacy of such measures unless and until there is a proposed KPIA regulatory change.

The issue of justiciability was also assessed in the context of the other mechanisms adopted by the KPIA for ensuring Kyoto compliance. KPIA creates rather elaborate reporting and review mechanisms within the Parliamentary sphere. Considering the scope of these review mechanisms, the statutory scheme must be interpreted as excluding judicial review over issues of substantive Kyoto compliance including the regulatory function. Parliament has, with the KPIA, created a comprehensive system of public and parliamentary accountability as a substitute for judicial review.

USA 1

UNITED STATES of AMERICA, Plaintiff-Appellee, v. APOLLO ENERGIES, INC., Defendant-Appellant 2010 WL 2600502 (C.A.10 (Kan.))
United States Court of Appeals Justice(s): HENRY, ANDERSON, and TYMKOVICH.

Case Link

Introduction:

Appellants, Apollo Energies, Inc. and Dale Walker (doing business as "Red Cedar Oil"), were charged with violating the Migratory Bird Treaty Act (MBTA or "the Act"), which declares it a misdemeanor to "pursue, hunt, take, capture, [or] kill" birds enumerated by several international treaties. On numerous instances, an agent with the U.S. Fish and Wildlife Service discovered dead migratory birds lodged in each appellant's "heater-treater," a piece of equipment used in the course of appellants' Kansas oil drilling businesses. At trial, both

Apollo and Walker were convicted of "taking" or "possessing" migratory birds (each misdemeanor violations) and fined $1,500 and $500 total, respectively. The federal district court affirmed the convictions.On appeal, Apollo and Walker contested that (1) under the MBTA, it is not a strict liability crime to take or possess a protected bird or, (2) if it is a strict liability crime, the MBTA is unconstitutional as applied to their conduct.

Legal Framework:

Migratory Bird Treaty Act 1918

United States v. Corrow, 119 F.3d 796 (10th Cir. 1997),

Held:

As to the first contention, the United States Court of Appeals, Tenth Circuit, held that Appellants' assertion is foreclosed by United States v. Corrow, 119 F.3d 796 (10th Cir. 1997), which squarely concluded that "misdemeanor violations under [the MBTA] are strict liability crimes." Bound by the Corrow holding, the court concluded that the MBTA includes no mens rea requirement. As to Appellants' second contention challenging the constitutionality of the Act as applied to their conduct, the court concluded that while the Act is not unconstitutionally vague, "the MBTA requires a defendant to proximately cause the statute's violation for the statute to pass constitutional muster".

Thus, liability would attach only where the injury "might be reasonably anticipated or foreseen as a natural consequence of the wrongful act." Accordingly, the conviction against Apollo Energies was affirmed, since the record demonstrated that Apollo had notice of the detrimental effects of the heater-treater's exposed exhaust pipes for a nearly a year-and-a-half before the bird death resulting in its conviction. However, the first of two convictions against Walker was reversed, since the court found that Walker was unaware of the industry-wide problem and "no reasonable person would conclude that the exhaust pipes of a heater-treater would lead to the deaths of migratory birds." For the foregoing reasons, the court affirmed in part, reversed in part, and remanded for further proceedings consistent with its opinion.

USA 2

UNITED STATES OF AMERICA,(Plaintiffs-Appellee) v. C. LYNN MOSES(Defendant-Appellant) No. 06-30379
United States Court of Appeals, Ninth Circuit Justice(s): Pollak, L.H.; Fernandez, F.F.; McLane Wardlaw, K

Case Link

Introduction:

Admonishing appellant for 20 years of blatant disregard for the Army Corps of Engineers ("Corps") and the Clean Water Act ("CWA"), the Ninth Circuit upheld the Idaho district court's verdict finding appellant criminally liable for violations of the Clean Water Act.

Teton Creek ("Creek") is a tributary of the Teton River, which flows into the Snake River. In 1970, appellant Moses began working on a development next to Teton Creek. During the majority of the year, water does not flow in the Creek adjacent to the development because of an irrigation diversion upstream. In the spring however, water surges through the Creek next to the development. Water flows continuously year-round in the Creek above the diversion and below the development. In 1980, Moses began reshaping the Creek to better handle the seasonal flow. He hired heavy equipment operators to recontour and redeposit material to convert the original three channels of the Creek into one broader and deeper channel. The Corps repeatedly warned Moses that the stream alteration work required a CWA permit. From 1982-2002, the Corps issued at least five warnings, including a cease and desist order, a warning that failure to obtain a permit could result in civil or criminal penalties, and a notice of violation. Moses ignored the Corps warning and continued to pursue work on the Creek. In 2003, the EPA issued an administrative compliance order directing Moses to immediately cease unauthorized discharges. Moses did not respond and continued to work.

The district court sentenced Moses to 18 months imprisonment, one year of supervised release, and imposed over $9,000 in fines and special assessments. Moses appealed, asserting insufficient evidence to support the verdict. Moses claimed that the portion of the Creek that he manipulated does not constitute a water of the United States for the purposes of the CWA, and even if it did, the evidence did not show that he had made a discharge into that water for the purposes of the CWA. He further claimed that even if he had made a discharge into waters of the United States, the discharge did not require a permit.

The court demonstrated that the part of Teton Creek next to Moses' property was a water of the United States and therefore subject to the CWA and the Corps jurisdiction. Absent the diversion, Teton Creek would be a water of the United States because it flowed interstate and emptied into the Teton River, which itself emptied into the Snake River. The court held that a mere man-made diversion could not convert what was a part of the waters of the United States into something else and, thus, eliminate it from national concern. Further, the court held that the seasonal nature of the Creek could not prevent it from being a water of the United States.

Moses claimed that even if the Creek near his development was a water of the United States, he did not need a permit because he worked on the Creek when it was dry, and the movement of material was only incidental fallback.

Legal Framework:

Clean Water Act ("CWA")

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131- 35, 106 S. Ct. 455, 461-63, 88 L. Ed. 2d 419 (1985)

Held:

The court rejected Moses' claim because such an interpretation of the CWA would "countenance significant pollution of the waters of the United States as long as the polluter dumped the materials at a place where no water was actually touching them at the time." The court also rejected Moses' incidental fallback argument, and said that incidental fallback is defined by the regulations as “the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same place as the initial removal. The court opined that the “massive movement and redistribution of materials within Teton Creek” could only be defined as incidental fallback by “a mind committed to a predetermined answer.

Moses attempted two final arguments. First, he claimed that he did not need a permit because he was merely maintaining a currently serviceable structure, an act exempted from the permit requirement by 33 U.S.C. section 1344 suvdiv. (f)(1)(B). Exceptions from the CWA must be “analyzed in light of the Act’s purposes” and narrowly construed. Here the changes to the Creek were not changes to a structure and thus the exception did not apply. Finally, Moses claimed that his activities were permitted by Nationwide Permit No. 3, authorizing the maintenance of previously authorized, currently serviceable structure or fill. However, the court found that the Nationwide Permit was issued under the Rivers and Harbor, 33 U.S.C. section 403 act and therefore did not apply to activities covered by the CWA, and even if it did, at least a large portion of the work done on Teton Creek was completed after the Corps asserted jurisdiction.

The court therefore affirmed the conviction.

USA 3

United States v. CB&I Constructors, Inc. No. 10-55371

United States Court of Appeal for the Ninth Circuit Justice(s): Rawlinson, J.B.; Goodwin, A.T.; Fletcher, W.A.

Case Link

Introduction:

The federal government filed the lawsuit in 2008 against Merco Construction Engineers and its subcontractor for damages allegedly caused when the subcontractor, while building a water-storage project, ignited dry brush which resulted in a wildfire that spread to the national forest. The government sought to recover $6.6 million in fire suppression costs and unspecified damages for harm to wildlife habitats, soils, native plants, loss of recreational use, scenic views, the California red-legged frog habitats, and a historic mining camp.

Merco settled its liability for $2.1 million. Jurors awarded the government $7.6 million for fire suppression and other costs and an additional $28.8 million for "intangible" environmental damages. Their verdict found the defendants liable in negligence and trespass, assigning 65 percent of the blame to the subcontractor and 35 percent to Merco. The subcontractor appealed.

Legal Framework:

United States v. California, 655 F.2d 914, 917, 920 (9th Cir. 1980)

In British Columbia v. Canadian Forest Products, Ltd., [2004]

Held:

The three-judge appellate panel held that the damages award "was not grossly excessive" based on the substantial evidence the government presented at trial. According to the court, "under California law, the government was entitled to full compensation for all the harms caused by the fire, including intangible environmental harm"

USA 4

Native Village of Kivalina v. Exxon Mobil Corporation No. 09-17490

United States Court of Appeals, Ninth Circuit Justice(s): Pro,P.M.; Thomas, S.R.; Clifton, R.R.

Case Law

Introduction:

The Alaskan village of Kivalina brought a lawsuit against two dozen energy and utility companies alleging that global climate change traceable to the defendants had led to the loss of the Arctic sea ice protecting the village from winter storms, and that the resulting erosion had threatened the habitability of the village. claimants asserted that defendants' greenhouse gas emissions resulted in warmer winters, which lead to melting of sea ice and erosion of the shoreline around their community to the point that their village was set to fall into the sea. They brought suit against oil and gas companies, electric utilities and a coal company, seeking damages for an alleged nuisance. Plaintiffs did not seek injunctive relief, but instead sought damages for the cost of relocating the village.

The district court dismissed Kivalina's claims on two grounds: 1) plaintiffs lack standing because their injuries are not "fairly traceable" to any of the defendants' alleged wrongdoing; and 2) because the issues raised by the complaint require a legislative, not a judicial, solution, the claims are barred by the political question doctrine

Legal Framework:

Clean Air Act

AEP v. Connecticut, 2011

Held:

Plaintiffs have appealed the dismissal to the Ninth Circuit. The Ninth Circuit, without reaching the issue of standing, affirmed the dismissal on the ground that federal public-nuisance actions based on global warming have been displaced by the Clean Air Act. In its opinion, the Ninth Circuit followed the Supreme Court's decision in AEP v. Connecticut, announced on June 20, 2011. In AEP, the Supreme Court put part of the public nuisance climate-change genie back in the bottle, when it vacated a Second Circuit decision and rejected federal public nuisance claims seeking injunctive relief. It held that the Clean Air Act displaces private nuisance law where plaintiffs base nuisance claims on allegations that emission of greenhouse gases have contributed to global warming, at least when plaintiffs are seeking an injunction.

The Ninth Circuit held that the doctrine of displacement applies not just to federal climate-change claims seeking injunctive relief but to those claims seeking damages as well.

USA 5

League of Wilderness Defenders/Blue Mountains Biodiversity Project v. U. S. Forest Service No. 10-1397
United States District Court for the District of Oregon Justice(s):Simon.

Case Link

Introduction:

Plaintiffs filed the lawsuit in November 2010 seeking to halt the application of herbicides on 22,842 acres in the Wallowa-Whitman National Forest, including 875 acres designated for aerial spraying. The complaint raised concern about potential damage from herbicides to watersheds, riparian zones and streams. The court found that the agency's EIS showed that it "misunderstands the purpose of the cumulative impacts analysis." According to the court, the agency improperly started with the assertion that direct impacts from herbicide application would be minimal and then concluded that a thorough cumulative impacts analysis was therefore not necessary.

Legal Framework

National Forest Management Act, 16 U.S.C.

National Environmental Policy Act, 42

Clean Water Act

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989)

Held

The court agreed with plaintiffs that the agency's environmental impact statement (EIS) failed to analyze the plan's cumulative impacts and remanded the plan to USFS "for further analysis of cumulative impacts" consistent with the National Environmental Policy Act.

USA 6

Upper Blackstone Water Pollution Abatement Control District v. EPA No. 11-1474 and 11-1610

United States Court of Appeal for the First Circuit

Justice(s): Lynch, Souter, and Stahl.

Case Link

Introduction:

The petitions seek review of certain effluent limitations imposed by EPA in a National Pollutant Discharge Elimination System (NPDES) permit on the discharges of Upper Blackstone Water Pollution Abatement District, a sewage treatment plant located in central Massachusetts. The District's discharges are into the headwaters of a polluted river which, in due course, flows into other rivers, and ultimately empties into Narragansett Bay.

The Appeals Court indicates that the states of Massachusetts and Rhode Island each have strong interests in the health of these waters and generally have supported the EPA's decisions during the permitting process. The District, supported by its member towns, has an interest in avoiding compliance costs associated with the permit and has challenged the effluent limitations as premature and unsupported by the scientific record.

The District first attacks a scientific model the EPA incorporated into its analysis of the nitrogen-fueled cultural eutrophication in Narragansett Bay. The District argues that this model, which was created by the University of Rhode Island's Marine Ecosystems Research

Laboratory (MERL) in the 1980s to simulate water quality conditions in the Bay, is so unreliable and unrepresentative of actual Bay conditions as to entirely undermine the EPA's nitrogen analysis. The MERL model was peer-reviewed and published in a scientific journal.

Legal framework:

Clean Water Act 33 U.S.C. §1251 et seq. (1972)

Environmental Protection Agency Rules

Held:

In response, the Appeals Court said, "Where the agency follows the proper procedures and acts with a reasonable basis, both its choice of scientific data and interpretation and application of that data to real world conditions are entitled to deference. . . Where the EPA did rely on the MERL model, the record reflects that it fully accounted for the model's shortcomings. . . The District's argument that the MERL model should have been excluded from consideration entirely is without merit. . . The EPA also followed the proper procedures for ensuring that the model received scrutiny not only from the permittee, but from the scientific community and the public. . . The EPA's determination, based on its analysis of the evidence before it as a whole, that a nitrogen limit of 5.0 mg/L was necessary to achieve Rhode Island's water quality standards was not a 'hunch' or 'wild guess' but a rational exercise of judgment."

The District also challenged whether the nitrogen limit was "necessary" or "sufficient." The Appeals Court said, "We reject the first claim, since the EPA expressly found that the 5.0 mg/L limit was necessary to meet state standards, and that a higher limit would not achieve those standards." On the sufficient argument, the Appeals Court said, ". . . where a complex administrative statute, like those the EPA is charged with administering, requires an agency to set a numerical standard, courts will not overturn the agency's choice of a precise figure where it falls within a 'zone of reasonableness' . . . The nitrogen limit the EPA chose here is justified by the record and within the zone of reasonableness. The District's challenges to the limit fail." Other challenges are also dismissed.

USA 7

City of Tracy v. California State Water Resources Control Board
Superior Court of California

Justice(s): Frawley.

Case Law

Introduction

The City of Tracy (Tracy), and the Central Valley Clean Water Association (CVCWA), as an intervener, argued that the Water Board did not meaningfully consider the factors set forth in Water Code section 13241 when it adopted the salinity objectives in the 2006 Bay-Delta Plan. In 2007, the Central Valley Regional Water Quality Control Board (CVRWQCB) issued waste discharge requirements (WDR) and a national pollutant discharge elimination system (NPDES) permit for Tracy's wastewater treatment plant discharges to the San Joaquin River. The permit required Tracy to implement a salinity control plan and provided for the imposition of numeric effluent limitations if Tracy did not prepare a plan in a timely fashion. Ultimately, the permit was appealed to the Water Board, which decided that the permit should include final effluent limitations for EC. Tracy subsequently filed a petition for a writ of mandate seeking to have the court invalidate the southern Delta salinity objectives, arguing that the Water Board did not meaningfully consider the factors in Water Code section 13241 when it established the objectives. Tracy also sought to invalidate Water Board Order WQ 2009-0003 applying the southern Delta salinity objectives to Tracy's wastewater treatment plant discharges.

Legal Framework:

Clean Water Act 33 U.S.C. §1251 et seq. (1972)

Water Code section 13241

Held:

The court concluded that a writ of mandate should be issued directing the Water Board to reconsider the objectives after analyzing the section 13241 factors. The court issued a writ enjoining the Water Board from applying the objectives to Tracy's and other municipal wastewater discharges pending reconsideration of the objectives and adoption of an adequate program of implementation consistent with the court's ruling.

The court, in its decision, noted that the 1978 Bay-Delta Plan only considered economic benefits to water users from establishing the requirements, and did not consider the costs of establishing the objectives, or the associated methods identified to meet the objectives, including factors related to wastewater discharges. The Superior Court also found that the socioeconomic analysis in the EIR was inadequate because it was only conducted to determine whether there would be significant environmental effects. The Superior Court ultimately held that the responsibility is on the Water Board to establish water quality objectives for the "reasonable" protection of beneficial uses by considering the economics of water pollution controls, the water quality conditions that could "reasonably" be achieved, and the costs associated with the methods identified to meet the objectives.

The Court found that the significant responsibility the implementation plan contemplated placing on municipal dischargers to help meet salinity objectives warranted more than a general statement indicating that the CVRWQCB should place controls on municipal discharges of salts. The court held that when a program of implementation is revised to make previously-established water quality objectives applicable to new entities, the program of implementation must specifically address the change by describing the actions necessary to achieve the objectives, providing a reasonable time schedule, and including a monitoring program to measure compliance.

Ultimately, the Superior Court did not invalidate the southern Delta salinity objectives pending the Water Board's compliance with the writ of mandate. The Superior Court held that a writ shall be granted directing the Water Board to conduct the required section 13241 analysis and then reconsider the southern Delta salinity objectives. It also concluded that a writ shall be issued compelling the Water Board to adopt an adequate program of implementation.

USA 8

Friends of the Everglades, et al. v. South Florida Water Management District, et al No. 07-13829

United States Court of Appeals, Eleventh Circuit

Justice(s): Dubina, Carnes and Goldberg.

Case Link

Introduction:

The Clean Water Act (CWA) prohibits the discharge of any "pollutant" into the "navigable waters of the United States" without a permit. A "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." In other words, a pollutant cannot be added to navigable waters without a discharge permit. But, can regulated waters that are unaltered be transferred through a point source from one location to another location without a permit? That was the question in this case, and the EPA has historically said "no." In addition, in 2004, the U.S. Supreme Court said in 2004 that no permit is necessary where different water bodies are "meaningfully connected." In 2008, the Environmental Protection Agency (EPA) adopted a regulation that did not require a federal permit for transfers of "waters of the United States" to other "waters of the United States" where there has been no intervening industrial, municipal or commercial use. But, the exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred. That type of water transfer requires a permit. This case involved "back pumping" by the South Florida Water Management District of polluted water from drainage canals into Lake Okeechobee in Florida.

Legal Framework:

The Clean Water Act (CWA) 33 U.S.C. §1251 et seq. (1972)

Held:

The trial court ruled that the Water District had repeatedly violated the CWA by pumping polluted flood water (runoff that contained nitrogen, phosphorous and ammonia) into Lake Okeechobee where it allegedly damaged wildlife habitat, killed fish and fouled drinking water. The trial court held that water transfers between distinct water bodies that result in the addition of a pollutant to the receiving navigable water body are subject to the CWA's permit requirement.

USA 9

People of the State of California ex rel. Imperial County Air Pollution Control District; Imperial County Air Pollution Control District; County of Imperial, plaintiff, v. United States Department of Interior; Ken Salazar, Secretary of the United States Department of Interior; United States Bureau of Reclamation; Michael l. Connor, commissioner, Bureau of Reclamation, defendants. 09cv2233
United States District Court, District of California

Justice: Battaglia., A.J.

Case Link

Introduction:

Plaintiffs, Imperial County and the Imperial County Pollution Control District, argued that the U.S. Department of Interior (DOI) violated the Clean Air Act and the National Environmental Policy Act when it approved the Colorado River Water Delivery Agreement (CRW DA) in 2003. They argued that implementation of the CRW DA and another Colorado River distribution agreement, the Quantification Settlement Agreement, will cause injury to public health, the environment and fish and wildlife habitats through accelerated salinization of the Salton Sea and increased emissions resulting from greater exposure of the Salton Sea shoreline.

Legal Framework:

Clean Air Act 42 U.S.C. §7401 et seq. (1970)

National Environmental Policy Act 42 U.S.C. §4321 et seq. (1969)

Held:

According to the federal court, "in lawsuits against the federal government, a state does not have standing to protect quasi-sovereign parens patriae interests because, with respect to the relationships between citizens and the federal government, the United States, and not the state, is presumed to represent the interests of the citizens as parens patriae." Determining that plaintiffs lacked standing to challenge CRW DA, the court further noted that neither plaintiff is regulated by CRW DA, neither claims a right to divert Colorado River water, and neither claims to own land beneath or adjacent to the Salton Sea. Thus, they could show no injury-in-fact, an element necessary to demonstrate standing.

ARGENTINA 1

Environmental Lawyers Association c Argentina / Buenos Aires Province and other s / recomposition action and sanitation Reconquista River s / injunction A. 1722 XLII Supreme Court of Justice of the Nation Buenos Aires

Argibay, C.M.; Lorenzetti, R.L.; Highton de Nolasco, E.I.; Fayt, C.S.; Petracchi, E.S.; Maqueda, J.C.

Case Link

Introduction

This case originates in the demand for restructuring and reorganization of the Reconquista River Basin presented by the Argentina Association of Environmental Lawyers against the Province of Buenos Aires and against the State. The applicant also requested the subpoena as required of the Autonomous City of Buenos Aires. The plaintiff stated a reversal of pollution to the Tigre River, due to differences in water levels between the relief channel and the Reconquista River. According to the applicant, such contamination was caused by organic and inorganic, industrial and residential rollovers, on the area that operates as the runway of the Reconquista River. He argued that this contributed to the natural disturbance of the water balance of the basin, causing the elevation of the water table to its entire length, and also the propensity to flood this entire basin. With the application filed before the Supreme Court requesting a plan of environment and health system, stating the grounds for the action brought for re-composition and requesting the issuance of precautionary measures to protect the health of coastal residents and other affected measures. The plaintiff claimed it is the responsibility of the National Government under the exclusive powers vested in terms of regulation and control of waterways (art. 75 of the Constitution), and in this capacity as primarily responsible for the protection and compliance with the Treaty of Rio de la Plata and its Maritime Front of the River Plate Basin. On the other hand, it blamed the Province of Buenos Aires, because it has the original dominion over the natural resources in their territory.

Legal Framework:

The Constitution of Argentina 1994 article 75

The Treaty of Rio de La Plata and Maritime Boundary 1973.

Jurisdiction of the Supreme Court in Local Government Environmental Cases

Held:

The Supreme Court stated that the present case does not correspond to its original jurisdiction. According to the Court, the fact that the applicant holds that the present case concerns federal standards nature, or claims the responsibility of the Federal Government in the protection and enforcement of the Treaty of Rio de la Plata and its Maritime Front is unfounded as the original jurisdiction of the Supreme Court on account of the material comes only when the action is brought directly and exclusively based on constitutional requirements of carácternacional, act of Congress or treated in such a way that the federal question is predominant in the cause, but not where, as in the case are also included issues of local character and the competence of local authorities, such as those pertaining to environmental protection in the province affected. The Court observes and recognizes that local authorities have the power to apply the criteria of environmental protection they deem conducive to the welfare of the community they govern, and to assess and judge whether the acts performed by its authorities, in exercising its own powers, affect the welfare pursued. In short, the Court considers that it is only the Province of Buenos Aires who will respond and perform the steps necessary to achieve the re-composition of the environment that is said to be affected in the event that it is determined to have committed acts or omissions in the exercise of its powers, which is its police powers in environmental matters. In this regard, the Court adds that there is envisioned that the situation denounced by the plaintiff might affect the environment beyond the limits of the province in which the degrading factor was generated and that, ultimately, there is no evidence to support the view of the Nation substantial part in the case. The judgment states that the cause is not the original jurisdiction of the Supreme Court of Justice of the Nation.

ARGENTINA 2

Vargas, Ricardo Marcelo c / Province of San Juan and other s / environmental damage V175 XLIII
Supreme Court of Justice of the Nation Buenos Aires

Lorenzetti, Highton, Petracchi and Maqueda

Case Link

Introduction

This case arises from the collective environmental damage lawsuit filed by residents of the Province of San Juan against Barrick Explorations Argentinas SA (BEASA), Mining Explorations Argentinas (EMA) SA (in its capacity as concessionaires operating a binational mining project between Argentina and Chile, called Pascua-Larna) and against the Province of San Juan (whether as grantor authority). The applicants specifically requested that companies and the defendants Province were forced to hire insurance coverage sufficient to guarantee funding for the rebuilding of the damage that may occur in the wake of mining prospecting, exploration, exploitation entity, closure and post-closure of the site. Also requested that an evaluation of the influence zone of that project was ordered to establish the state of the environment, certifying the extent of the damage and risks introduced in relation to the rules on minimum applicable

The applicants state that part of the project is located within the International San Guillermo Biosphere Reserve, which is a protected area and part of the World Network of Biosphere Reserves

Legal Framework

Argentina National Law 25,675 General Environmental Law, article 22 &30

28 C/ Resolution 2.4 of the UNESCO General Conference 1995, UNESCO Paris 1996 Biosphere reserves: *The Seville Strategy and the Statutory Framework of the World Network*

Environmental Impact Assessment

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Elimination (Law 23,922), the Convention for the Conservation VicuÍÍa and Management (Law 23,582), the Protocol of San Salvador (Law 24,658)

Held

The Court considered the pleas put forward by the applicants and therefore requires the Province of San Juan and the Argentine Government to indicate whether there have been studies of environmental impact under the Protocol signed between Argentina Republic and the Republic of Chile, additional aI Treaty mining integration and complementation between Argentina and Ia Republic of Chile for the Pascua-Larna Mining Project.

ARGENTINA 3

Community Diaguita Andalgalá c / Province of Catamarca and other s / environmental protection C. 284 XLVII ORI

Supreme Court of Justice of the Nation Buenos Aires

Lorenzetti, Highton, Petracchi, Fayt, Argibay and Maqueda

Case Link

Introduction

The Diaguita Community Andalgalá brought environmental protection case against the Province of Catamarca, the Federal Government, the Province of Tucuman, Salta Province, the Province of La Rioja and against the person holder of the mining concession in charge of the exploitation of Agua Rica deposit. They requested that the immediate cessation of all activity and operation conducted by the coerced Minera Agua Rica LLC, Argentina branch. The applicant argued imminent serious impairment to the health and livability of the environment where the community lived.

The applicant filed the action in the Federal Court, considering that the case would be federal matters by inter-jurisdictionality of possible environmental damage. The defendants argue however that the object of the cause does not lie with the original jurisdiction of the Supreme Court of Justice of the Nation.

Legal Framework

Rio Declaration on Environment and Development 1992 Principle 15 (Precautionary Principle)

Environmental Impact Assessment

Section 41 of the Argentine Constitution 1994

Argentina National Law 25,675 General Environmental Law, article 7

Held

In the latter respect the Supreme Court observes that recourse to federal jurisdiction is sufficient that the harm alleged in the complaint directly affects an inter-juridiccional resource. The Court adds that the lawsuit and the report submitted by the defendants (who recognize possible effects on water resources environmentally indirectly harm other jurisdictions and watersheds that are jurisdictional resources themselves) are sufficient to establish federal jurisdiction basis. Moreover the Court, applying the precautionary principle, provides suspend the project until a cumulative impact study is carried out by the provinces involved.

CHILE 1

Meat Pork Expo Chile SA c / National Environmental Commission - Action for Protection N. 5191-2010

Supreme court Santiago de Chile Justice(s): Lagos, J.; Carreno, H.; Pierry, P.; Araneda, S.; Brito, H.

Case Link

Introduction:

The event giving rise to the instant case before the Supreme Court is Resolution No. 4,986 of 2009 the Executive Director of the National Environment Commission, by which was hosted a complaint appeal filed by the company Meat Pork Expo Chile SA against an earlier decision that had adversely described the project, affect tourism and way of life, ordering as an environmental impact study, and thereby being awarded a license to operate a pig slaughtering plant outside the urban boundary district of Casablanca.

Legal Framework:

Right to clean/healthy environment; standards

Held:

The Supreme Court, overturning the ruling of the Court of Appeals of Valparaiso, annulled the environmental assessment of the project. The Court found that the decision was illegal and arbitrary, since the challenged act represents a threat to the right to live in a pollution free environment. The Court took into account that the record shows that the project in question may negatively impact the tourism value of the area, since odors emanating influence the decision of tourists visiting the area.

CHILE 2

Correa with Regional Environment Committee Valparaiso s / resource protection N. 1219-2009

Supreme court Santiago de Chile Justice(s): Mauriz Aymerich, B.; Oyarzún Miranda, A.; Carreño Seaman, H.; Arau, P.P.; Araneda Briones, S.

Case Link

Introduction:

This case was an appeal regarding a project where the actors questioned the installation and operation of a power plant equipped with technology of pulverized coal combustion. The Court found the illegality of the permit issued in terms violated the Intercommunal

Plan of Valparaiso, on the grounds that the project would affect a restriction zone flood, whose land use is purely recreational or green.

Legal Framework:

Constitution of Chile

General Act of Urbanism

Held:

The Supreme Court, confirming the decision of the Court of Appeals of Valparaiso, annulled the environmental qualification of Campiche thermoelectric project, AES Gener, located in the industrial area of Las Ventanas, Valparaíso Region. The Court stressed that any change in land uses assigned to a particular area or sector require prior amendment of the relevant regulatory plan, as provided for in Article 61 of the General Act of urbanism and Construction. The Court therefore considered that the project violated the right to live in an environment free from pollution, guaranteed by the number 8 of article 19 of the Constitution of the Republic of Chile

CHILE 3

Santiago Sanhueza Rohr c / Smartcom SA s / resource protection Nº 5665-2000 Court of Appeals Santiago de Chile Justice(s): Jacob Chocair., R.; Cisterna Rocha, L.; Madrid Crohare, A.

Case Link

Introduction:

This event aims to protect the resource presented by S. Rohr Sanhueza against telecommunications companies Smartcom SA, Startel SA, Bellsouth and Entel PCS. The appellant bases the appeal stating that the respondents have proceeded to the installation of ghosts transmit antennas mobile phone, without the environmental impact study required by Article 10 of Law No. 19,300, by radiation generating stations mobile base, seven hundred cellular transmission antennas and several million sets of existing cellular transmission and reception, which would not have been subjected to environmental law established for the protection of citizens.

The defendants asked the rejection of the appeal alleging the invalidity of it, because there were no unlawful or arbitrary acts or omissions, and have the order set the current legal firms, especially the General Law on Urban Planning and Construction and the General Law of Bases general Environment.

Legal Framework:

Article 10 of Law No. 19

The rules of Law No. 18,868

Held:

In the analysis of this precautionary action, the Court holds that the appellant has not demonstrated the existence of a right which holds, that is the direct object of the claim or purpose pursued by the action, which is simply to protect their exercise; states that neither a direct and consequential interest in the caution warns individually requested, all of which leads to the conclusion that has been driven by precautionary avenues lack of standing.

Moreover, the Court notes that the respondents companies are public service concession digital mobile phone, a condition that has been granted by the competent authority under the rules of Law No. 18,868 that enables them to install, operate and exploit telephony systems within the geographical areas which have been recognized administratively them. It also notes that the appellant has not demonstrated that the facilities of antennas or base stations mentioned cause specific hazards on the health of the population, nor that its operation is a source of contamination, let alone that these facilities generate electromagnetic waves enhance a density greater than the maximum established by the competent authority, all of which excludes an arbitrary or unlawful act of the companies appealed. For the above reasons, the Court of Appeals rejected the appeal of protection.

COLOMBIA 1

Julio Cesar Rodas Monsalve and Ministry of Environment c / s National Planning Department / constitutional motion D-2589

Constitutional Court Bogotá Justice(s): Tafur Galvis, A.; Martínez Caballero, A.; Barrera Carbonel, A.; Naranjo Mesa, V.; Beltrán Sierra, A.; Cifuentes Muñoz, E.; Gaviria Díaz, C.; Hernández Galindo, J.G.; Díaz, F.M.

Case Link

Introduction:

This case concerns a constitutional challenge to the unconstitutionality of paragraphs 6 and 7 of Article 1 of Law No. 507 of 1999, by which the Law 388 of 1997 was amended to extend the meaning is claimed the deadline set for municipalities and districts formulate and adopt plans and zoning schemes (POT). In his constitutional complaint, the applicant submits that the contested provisions are unconstitutional, as affirm the positive response as a binding instrument to achieve the formulation and adoption of Land Management Plans (POT) by Municipalities, Districts and Metropolitan Areas, preventing the State to fulfill its constitutional duty to protect the diversity and integrity of the environment. The applicant considers infringed the fundamental right to a healthy environment and the state's duty to protect.

Legal Framework:

Law No. 507 of 1999 Colombia

Law 388 of 1997 Colombia

Held:

For the resolution of the case, the Constitutional Court starts from the premise that environmental protection is an objective of principle within the framework of the rule of law. As is part of the living environment of man, indispensable to their survival and that of future generations, the environment is the basis of what the Court has called "ecological constitution", formed by the set of higher provisions establishing quotes from which should be regulated community relations with nature. As regards the positive response provided by the contested provisions, the Court observes that under the assumption that the Constitution also provides for the public's right to enjoy a healthy environment and imposes upon the State the duty to protect the diversity and integrity the preservation of a healthy environment as a prerequisite of life and sustainable development, and the efficiency and speed that should guide the public service: the environment in order to control its deterioration, a tension between different objectives and constitutional principles arises. The Constitutional Court considers that it is impossible to relieve the state law in its constitutional obligation to prevent and control environmental deterioration, paradoxically, by way of penalty for delinquent and negligent attitude of some of its authorities. The protection of the environment and natural resources implies a state whose foundation not only commitment is enshrined in the Constitution, but also in international agreements entered into by Colombia. For these reasons the Court recognizes as founded the appeal of unconstitutionality promoted and declares unconstitutional the contested provisions.

COLOMBIA 2

Carlos Humberto García Guzmán, Luis Alfredo García Gómez, Alejandra Azuero Quijano and Daniel Bonilla Maldonado s / lawsuit challenging the constitutionality of Law 1021 of 2006 "Whereby the Forest Act is promulgated" C-030 Constitutional Court Bogotá Justice(s):Vargas Hernández, C. I.; Escobar Gi, R.; Araujo Renteria, J.; Monroy Cabra, M. G.; Cepeda Espinosa, M.J.; Pinilla Pinilla, N.; Córdoba Trivino, J.; Sierra Porto, H.A.; Gonzalez Cuervo, M.

Case Link

Introduction:

In this case, the plaintiffs ask the Constitutional Court to declare the unconstitutionality of the whole of the Law 1021 of 2006 (Forest Act) for consultation with indigenous communities have not performed, in issuing process, or to peoples of African descent, which would constitute a violation of Articles 1, 2, 3, 7, 9, 13, 93 and 330 of the Constitution. These provisions establish participatory and pluralistic character of the state, the principles of direct and participatory democracy and the protection of ethnic and cultural diversity of the nation. They also participated as interveners the National Indigenous Organization of Colombia and the Process of Black Communities of Colombia.

Those involved by the Ministries of Agriculture and Rural Development and the Environment, Housing and Territorial Development oppose the lawsuit saying the law was passed in the public and deliberative stage of Congress and the same, containing the general framework forest policy, not directly affect indigenous and Afro-descendant communities whose rights, especially autonomy for forest management in their territories, would even guaranteed by the law itself.

Legal Framework:

Law 1021 of 2006 (Forest Act)

Constitution of Colombia 1991 articles 1, 2, 3, 7, 9, 13, 93 and 330

Held:

The Court addresses the following topics: a) The nature of the eventual vice of unconstitutionality of a law consultation with indigenous and tribal communities have been omitted; b) the legal framework of the right of indigenous and tribal peoples to consultation of administrative or legislative measures that affect them directly, and c) the scope of the Forest Act. The Constitutional Court observes that the general and comprehensive nature of the impugned law makes it impossible to exclude from its scope to indigenous communities and also takes into account that the same law, which is comprehensive and applies to the entire national territory, concerns the exploitation of forests, something that has intimate connection with the identity of indigenous and Afro-Colombian communities and their chances of survival. , Because of the required consultations had not been made, for these reasons, the Court declares unconstitutional the Law 1021 of 2006 "Whereby the Forest Act is promulgated".

COLOMBIA 3

Oscar Carupia Domicó and others, on behalf of the Embera-Katío, Chidima-Tolo and Pescadito c / Ministry of Transport guards and others T-129/11
Constitutional Court Bogotá Justice(s): Pretelt Chaljub., J.I.; Pinilla Pinilla, N.; Palacio Palacio,, J.I.

Case Link

Introduction

This case arises from the action of monitoring by Oscar Carupia Domicó and others, on behalf of the Chidima-Tolo and Pescadito guards belonging to the Embera Katío ethnic group against the Ministries of Transport, Environment, Housing and Territorial Development, Interior and Justice Minister of Mines and Energy, Agriculture, Defense Advisory Royalties attached to the National Planning Department Council, the mayors of Unguía and Acandí, the Regional Autonomous Corporation of Chocó (Codechocó), the National Army Brigade XVII and Logistics Agency of the Armed Forces.

The general problems which stand this legal action and by seeking to protect their rights can be summarized as follows: (i) the work for a road through the guards; (ii) the electrical interconnection project between Colombia and Panama; (iii) procedures mining concession for gold mining; and (iv) the illegal invasion of the territory and the danger of navigating the economic expectation of works and projects. The actors believe were violated their rights to consultation, participation, collective property, unless displaced due process and the recognition of ethnic and cultural diversity of the nation, to life and livelihood as a people indigenous.

Legal Framework:

Defense Resolution 051 2007

Article 7.4. Convention 169

Decree 1320 of 1998,

Constitutional protection of ethnic and cultural diversity.

Held:

In settling the case, the Constitutional Court prepares detailed considerations about the special constitutional protection of ethnic and cultural diversity of the nation; recognition in indigenous affairs and autonomy in their territories; the obligation of the State and individuals to protect cultural and natural wealth of the Nation; the fundamental right of ethnic communities to prior consultation in respect of works, projects or activities that have the potential to affect their territories.

The Court revoked the ruling handed down by the Civil Chamber of the Supreme Court and, instead, granted the protection of fundamental rights to prior consultation with ethnic communities and the existence, independence, integrity and cultural identity and office of such peoples, like the protection of natural and cultural wealth of the nation. Consequently ordered the Ministry of Interior and Justice to initiate the necessary procedures against the previous consultation requested by the mayor of Acandí extending it to all parties involved in the process of planning and execution of the road, considering the pursuit of free, prior and informed community pondering the real alternatives to modify the layout of the road to the options described in the report of the Ombudsman consent.

COLOMBIA 4

Tutela filed by Cano Alba Rocío Román c / against Regional Autonomous Corporation of Caldas-CORPOCALDAS. T-608/11
Constitutional Court Bogotá Justice(s): Henao Pérez., J.C.; Mendoza Martelo, G.E.; Palacio Palacio, J.I.

Case Link

Introduction

In this case the Constitutional Court examines the tutela filed by a citizen against Regional Autonomous Corporation of Caldas-CORPOCALDAS. The action stemmed from the fact that officials stole the plaintiff CORPOCALDAS a parrot because this is a protected wildlife species. The judge rejected the claim first grade actor, holding that it did not submit permit, authorization or license to practice hunting or justified the holding of the animal species or forms of animal breeding under Law 611 tested 2000, subject to the parameters of sustainable development.

Legal Framework:

Law 611 tested 2000

Article 43 of the Code and Renewable Natural Resources and Environmental Protection

Stockholm Declaration

Held:

To solve the case, the Court analyzes the constitutional provisions that make up the so-called "ecological constitution" as well as protection to a healthy environment within the national system. In particular, it notes that after the Stockholm Declaration took place in Colombia a radical change in the conception of the environment, aimed at proper use of resources, meaning that they are limited, their conservation is essential to the preservation of humanity and a duty both individuals and the state. From this perspective the environment is a common heritage, whose activities are social and where the purpose of the regulations is to ensure the preservation, restructuring, improvement, conservation and use of renewable natural resources interest. Among the modifications introduced with coding, the Court emphasizes Article 43 of the Code and Renewable Natural Resources and Environmental Protection, which provides that the right of private ownership of renewable natural resources shall be exercised as a social function. Based on these considerations, the Court rejected the tutela and confirms the judgment of first instance.

COLOMBIA 5

Camilo Augusto Poveda Quintana Personero Municipal de Nemocón y otros c/ Corporación Autónoma Regional de Cundinamarca T-123/09
Constitutional Court Bogotá Justice(s): Reales Gutierrez., C.E.; Vargas Hernández, C.I.; Araújo Rentería, J.

Case Link

Introduction

This case concerns the tutela filed against the Regional Autonomous Corporation of Cundinamarca, in the process of review of the order made by the High Court of Cundinamarca and the Supreme Court. The actors had filed his lawsuit against the Regional Autonomous Corporation of Cundinamarca, considering that the acts and omissions of that corporation violates their fundamental right to democratic participation and due process.

The contest originated in an agreement adopted by the City Council Nemocon, whereby the Land Use Plan of the town is defined. Article 66 of the Agreement provides that the municipality may carry out regional projects for the treatment of solid waste. Under that agreement the company techno environmental CAR SA requested the granting of an environmental license for the development of a proposed landfill in the village of Cerro Verde in the municipality of Nemocón. Representatives of citizens sent a letter to the Regional Autonomous Corporation expressing outright authorizing environmental license for the construction of a landfill in the town of Nemocon opposition. On the Regional Autonomous Corporation environmental license granted techno environmental SA, for the construction of a landfill in Cerro Verde sidewalk, omitting the results of the referendum considering them not binding on the corporation.

Legal Framework:

Article 66 of agreement adopted by the City Council Nemocon

Art.30 of Act 99 of 1993

Article 105 of the Constitution,

Statutory law of citizen participation mechanisms (art. 51)

Held:

The Constitutional Court upheld the decisions of first-degree Court and the Court of Cassation, on the basis of considerations concerning the weighting of rights and interests of various kinds. In particular, the Court recalls that the Court has made clear that the involvement of communities in decision-making in environmental matters can not reach the end of nullifying the right to enjoy a healthy environment, since this right is head all persons within the national territory. Therefore, citizen participation must be harmonized with the effective recognition of the other rights and principles enshrined in the Constitution. Given the constitutional and legal environmental system configuration in Colombia, the Court considers that the impact of decisions in this area adopted the Regional Autonomous Corporations goes beyond the strictly municipal level to interweave in a regional stage with national projection.

To that extent, its decisions cannot be conditioned by the will of citizens expressed in a referendum at the municipal level, as this only has scope on matters of own competence of the local administration. In short, in the opinion of the Court is not the fundamental right to citizen participation is violated when a Regional Autonomous Corporation does not address a referendum at the municipal level, for the purposes of issuing an environmental license, because it is different jurisdictional areas, as provided in Article 105 of the Constitution, statutory law of citizen participation mechanisms (art. 51) and the rules governing the system of environmental protection.

COLOMBIA 6

Constitutional claim against the Law 1333 of 2009, for which the penalty procedure established environmental and other provisions 703/10
Constitutional Court Bogotá Justice(s): L.E. Montealegre Lynette

Case Link

Introduction:

This case concerns the constitutional claim brought by a citizen against Articles 32, 38, 39, 40, 43, 44, 45, 46, 47, 48 and 49 of Law No. 1,333 of 2009, the that environmental penalty procedure is established. The actor claims that the contested provisions infringe the fundamental right to due process and in particular the right of defense and the second hearing. In particular, the contested rules relate to preventive measures provided under the environmental penalty procedure, which, under the Act, are immediately enforceable against them and no appeal. Furthermore, the applicant alleges violation of the constitutional principles of non bis in idem and proportionality to the gravity of the infringement. Also, another part of the charges referred to sanctions that environmental authorities are authorized to impose.

It involved in the process the Ministry of Environment, Housing and Territorial Development, which defends the constitutional legitimacy of the challenged rules alleging substantially the preventive nature of the Colombian environmental law, in accordance with the precautionary principle.

Legal Framework:

Articles 32, 38, 39, 40, 43, 44, 45, 46, 47, 48 and 49 of Law 1333 of 2009

Article 80 of the Constitution of Colombia 1991

Held:

The Constitutional Court examines the questions of the actor from the study of the constitutional position of environmental protection as a legal right. The Court considers in particular Article 80 of the Constitution, which requires the State to prevent and control the factors of environmental deterioration, and to apply the appropriate legal sanctions and demand reparation for the damage caused. The Court examines the content and scope of the principles of prevention and precaution. The Court finds that the allegations made by the plaintiff cannot succeed, in consideration of the environmental assessment as legal and collective interests that involves protection. Therefore rejects the constitutional complaint and declares exequibles the challenged provisions.

COLOMBIA 7

Community Action Board of Neighborhood City Metropolitan Municipality Barbosa, Santander Department c / Municipality of Barbosa T-851/10
Constitutional Court Bogotá Justice(s):Sierra Porto., H.A.; Vargas Silva, L.E.; Calle Correa, M.V.

Case Link

Introduction:

This case concerns the tutela filed by the President and Legal Representative of the Community Action Board of the neighborhood Metropolitan Municipality City Barbosa against the Municipality of Barbosa, by requesting the protection of the fundamental right to the environment healthy, which considers violated by the Mayor defendant to not exercise proper supervision, monitoring and control management service waste and rain water from surrounding neighborhoods, allowing the misuse of the sewerage system, thus causing ponding of sewage and thereby odors and proliferation of a large number of microorganisms and insects of different diseases.

Legal Framework:

Articles 86 and 241, paragraph 9 Of the Constitution

Articles 31 to 36 of Decree 2591 of 1991

Held:

The Court considers that a breach of the right to environment is not caused by the reasons given by the plaintiff in the letter of guardianship, but for breach of orders uttered at different times by the Autonomous Regional Corporation of Santander with the aim of making cesar pollution caused by the dumping of sewage by the inhabitants of the village, therefore, in accordance with the principle iura novit curia, which allows the court to disregard the rules given by the parties to decide according to applicable law, conduct under the framework of the right to administrative due process is analyzed. If the city administration had complied with the orders issued by the Regional Autonomous Corporation of Santander, would have provided a solution to the problem of pollution and thus had ceased the violation of the right to the environment, the health of the residents of that neighborhood and the right to housing. For these reasons, the Court granted guardianship and orders the municipality of Barbosa to solve environmental pollution in the aforementioned neighborhood.

Note the consideration of the Court according to which the right to environment consists of the following three types of obligations: to respect, protect and fulfill. The Court notes that the right to adequate housing is not satisfied if the place where you reside is built in areas where there is environmental pollution caused by toxic substances or harmful organic residues for people who live there.

BANGLADESH 1

Nurul Islam v. Government of Bangladesh WP 1825 of 1999
Supreme Court of Bangladesh

Karim J.

Case Link

Introduction:

The petitioner in this case sought court orders prohibiting all forms of tobacco advertisements. He complained about dangers to life and health caused by smoking and claimed that the environment was polluted by tobacco consumption. He argued that all the tobacco related companies were advertising their products in different spheres of media such as newspapers, magazines, television, radio and billboards. The statutory warning about health hazards was so small that it was not even readable thereby defeating the spirit of the laws to make awareness about the dangerous nature of the tobacco based products. The petitioner asserted that the great majority of rural people who consumed tobacco based products were illiterate and completely unaware of the dangers and harmfulness of consuming it.

Legal Framework:

Constitution of Bangladesh 1972 Article 31

Held:

The court analyzed jurisdiction within and outside Bangladesh related to the matter, national legislation including the fundamental rights under the constitution as well as policies adopted in other countries. It emphasized that it could not be oblivious to the effect of consumption of tobacco and the effect of promotional advertisement not only among the young but among unaware and illiterate citizens. The Court was oath bound to protect the Constitution including the fundamental rights of the citizens and was obliged to enforce the same even in the absence of any appropriate legislation.

Cigarette advertisement on the news media, bill boards or on the electronic medias had the effect of propagating and inducing people, particularly the younger generation to adopt the smoking habit which resulted in endangering human life and the environment. Thus, advertisement of cigarettes were steps which could be termed detrimental to life and body of the people and in this view of the matter Article 31 of the Constitution was directly contravened by advertisements in any form.

Accordingly, the court directed the respondents that advertisement in any form of Cigarette, would not continue in any manner in Newspapers, Magazine, Signboards, or in any electronic media like Television/Radio. The Government had to take steps phase by phase to stop production of tobacco leaves in the tobacco growing Districts of Bangladesh, giving subsidy to the farmers, if possible and necessary to produce other agricultural products instead of tobacco. The Government had to direct the existing tobacco companies to switch over to some other industry to prevent production of Cigarettes. The importation of cigarette or tobacco related products had to be prohibited within a reasonable period.

BANGLADESH 2

A.P. Gunnies Merchants Association v. Govt of A.P W.P. 386/2000

High Court of Judicature of Andhra Pradesh Hyderabad

Sinha J. & Rao J.

Case Link

Introduction:

There were scientific findings which were based on air quality monitoring data indicating that the business of cleaning and trading gunny bags had negative impacts on the air and environment of Maharajgunj. The respondent State Government therefore decided that it was necessary to shift the gunny bags cleaning and trading business to an environmentally safer place and accordingly issued a government order. The petitioners contended that the respondent had no jurisdiction to direct the petitioners to shift their place of business, when the business carried on by them was not a polluting one. They also contended that only five per cent of the traders dealing in gunny bags took recourse to dusting and cleaning of the old and used gunny bags, by reason whereof pollution was created, and therefore, the traders who took recourse to such dusting and cleaning of old and used gunny bags should be directed to close their business instead of the entire market.

Legal Framework:

The Environment (Protection) Act, 1986 Section 2(a), (b) and (c)

Air (Prevention and Control of Pollution) Act, 1981

Held:

The court was of the view that the submission of the petitioners that for the acts of a handful of the traders, at whose instance air and environmental pollution was caused, the entire business community dealing in gunny bags should not be directed to be shifted, could not be accepted. Causation of environmental pollution having been admitted, the onus was heavily upon the petitioners to prove that by reason of their activities no pollution was caused. It was clear that a licence could be cancelled for creating nuisance. According to the Constitution of India, the right to carry on business or trade was subject to any restriction that could be imposed by any law in force. The right of the petitioners to carry on business in old and used gunny bags could not be said to be absolute.

Since the business carried on by the petitioners was endangering the lives of the people living in the area, more particularly the traders and the public in general, who visited the market day in and day out, as also the workers engaged therein, the court held that no fault could be found in the impugned order which directed the shifting of the business of the petitioners from a thickly populated area to a safer place to avoid air and environmental pollution. The writ petition had no merit, and it was accordingly dismissed. This order, however, did not preclude any person from making an application to the Municipal Corporation of Hyderabad for grant of fresh licence if he intended to carry on business in new and unused gunny bags.

INDIA 1

Him Privesh Environment Protection Society and others vs State of Himachal Pradesh and others CWP No. 586 of 2010
04 May 2012 Himachal Pradesh High Court Justice(s): Karol, S.; Gupta, D.

Case Link

Introduction:

It was alleged that the cement plant had been set up in gross violation of environment laws, especially the Environment Impact Assessment Notifications of 1994 and 2006. Also, no proper public hearing was conducted and village land had been wrongly transferred by the State in favour of the JAL. The project comprised a cement grinding and blending plant of 1.75 million tonne capacity for which the Pollution Control Board granted “Consent to Operate”. The JAL gave an impression that the cost of the plant was less than Rs 100 crore and, therefore, no environment clearance was required. The petitioner alleged that the cost was more than Rs 100 crore and the company purposely understated it to circumvent the EIA notification (1994). It pointed out that in the project report; the cost of the entire project was projected at Rs 450 crore. Out of this, only Rs 90 crore was the cost of the thermal plant. Hence, the cost of the cement plant was over Rs 350 crore.

Legal Framework:

Constitution of India Article 226

Environment Impact Assessment Notifications of 1994 and 2006

Held:

The Himachal Pradesh High Court quashed environmental clearance to its 25 MW thermal plant and imposed a penalty of Rs 100 crore for obtaining clearance for the cement plant by indulging in blatant "fraud and falsehood". It managed to "fool the government, the board, the Union Ministry of Environment and Forests and the Expert Appraisal Committee" into believing that it was a standalone grinding unit not requiring environmental clearance. It also ordered dismantling of the thermal plant in Bagheri (Nalagarh) within three months while observing that "the time has come to deal sternly with the people who have no respect for law".

INDIA 2

Indian Council for Enviro-legal Action and others (Petitioners) v. Union of India and others (Respondents) IA no 36 and 44

Supreme Court of India Justice(s): Dattu, H.L.; Bhandari, D.

Case Link

Introduction:

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

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

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

The judgment directed the closure of the factories attached to the property of the polluter and directed the Ministry of Environment and Forests of India to recover the cost of eco-restoration from the industries held liable. For 15 years, the polluters have pursued legal tactics to delay enforcement of the court's 1996 judgment. The Court's recent decision concludes, in part: "This is a very unusual and extraordinary litigation where even after fifteen years of the final judgment of this court the litigation has been deliberately kept alive by filing one interlocutory application or the other in order to avoid compliance of the judgment. The said judgment of this Court has not been permitted to acquire finality till date. This is a classic example how by abuse of the process of law even the final judgment of the apex court can be circumvented for more than a decade and a half".

Legal Framework:

Writ Petition No. 967 of 1989

Development and Regulation Act 1951

Water Act Section 33 A

Article 12 and 32 of the Constitution

Held:

The Supreme Court gave its verdict on the long impending judgment on the Bichhri case, Writ Petition No. 967 of 1989. It imposed a fine of Rs 38.385 crores on Hindustan Agro Chemicals Ltd (HACL) with compound interest since 1997 for the remediation of over 350 hectares of land in Bichhri. The Court also slapped a fine of Rs 10 Lakh on HACL for keeping the litigation alive for almost 15 years even though the court had disposed the petition in 1997, imposing Polluter Pays Principle according to which polluter must pay for the damage done to the human beings and environment.

INDIA 3

National Trust for Clean Environment v. Union of India and others, (2010) Writ Petitions No.15501to 15503

High Court of Madras Justice(s): Elipe Dharmarao, N. Paul Vasanthakumar

Case Link

Introduction:

These writ petitions were filled challenging and questioning the establishment of the Copper smelting plant ThooThukudi by Sterlite Industries (India) Limited by various organisations and representatives of recognized political parties. They planned to set up the plant at Tutucorin under impugned orders, necessary permissions were granted by the state and Central government and the Pollution control Board without bothering about the pollution and health hazards posed by such a plant. The plant was originally supposed to be set up at Gujarat and Goa then Ratnagiri but faced stiff opposition from the local owing to the possible adverse effects of the pollution. It is their case that Tuticorin is a coastal town in Tamilnadu in the Gulf of Mannar region, which abounds in bio-diversity and about 2000 species of marine forms and 200 species of plants are reported to have been found in the region and there are 21 Islands near Tuticorin which has been declared and constituted as Marine National Parks, vide g.O.ms.No.962, Forest and Fisheries dated 10.9,1986 with a view to protect the unique and fragile flora and fauna in the region.

It is the further case of the petitioners that that while Tuticorin was thus gradually being affected by industrialization, the then central government and the government of Tamilnadu hastily accepted the proposal by the company to set up a large scaic copper smelting plant, ignoring the fact that three states in the country had rejected the proposal and further had not considered the adverse impact on the environment and the people.

Legal Framework:

Constitution of India articles 21, 39, 47 and 48-A

Held:

The court ruled that it is imperative that the health and hygienic atmosphere be maintained by keeping in view the provisions of both directive principles of state policy read with article 21 of the constitution. Anything which endangers or impairs the quality of life of the citizens by conduct of anybody either in violation or in derogation of laws must be viewed seriously, so as to protect the rights of citizens granted in the constitution. Articles 39, 47, 48-A of the constitution by themselves and collectively cast a duty on the state to secure the health of the people, improve public health and protect and improve the environment. Every Government/Authority must always favour the true, the good and above all the public interest and public good.

INDIA 4

Essar Oil Ltd. v. Halar Utkarsh Samiti & Ors (2004) INSC 31

Supreme Court of India Justice(s):Pal; Srikrishna

Case Link

Introduction

Essar Oil Ltd. sought to lay pipelines to pump crude oil from a single buoy mooring in the sea across a portion of a Marine National Park and Marine Sanctuary to their oil refineries in Jamnagar District. On the basis of public interest litigation petitions the High Court had held that Essar was not allowed to lay its pipelines.

Legal Framework:

Wild Life (Protection) Act, 1972

Forest (Conservation) Act, 1980

Environment (Protection) Act, 1986

Stockholm Declaration of 1972

Held:

The Supreme Court had to answer the question whether pipelines carrying crude oil could be permitted to go through the Marine National Park and Sanctuary. The answer to the question depended on an interpretation of the provisions of three statutes, the Wild Life (Protection) Act, 1972, the Forest (Conservation) Act, 1980 and the Environment (Protection) Act, 1986. The court emphasized that the interpretation had to be done keeping in mind the Stockholm Declaration of 1972 which had been described as the "Magna-Carta of our environment".

It stressed the importance of maintaining a balance between economic development on the one hand and environment protection on the other. But in a sense all development was an environmental threat. Indeed, the very existence of humanity and the rapid increase in the population together with consequential demands to sustain the population had resulted in the concreting of open lands, cutting down of forests, the filling up of lakes and pollution of water resources and the very air which people were breathing. However there needed not necessarily be a deadlock between development on the one hand and the environment on the other. The objective of all laws on environment should be to create harmony between the two since neither one could be sacrificed at the altar of the other.

The State had to, while directing the grant of a permit in any case, see that the habitat of the wild life was at least sustained and that the damage to the habitat did not result in the destruction of the wild life. That was the implicit major premise contained in the definition of the word "sanctuary" in the Wildlife Protection Act. It could not be said, however, that the invariable consequence of laying pipelines through ecologically sensitive areas has been the destruction or removal of the wild life. There was no a priori presumption of destruction of wild life in the laying of pipelines. These observations however were not meant as a general licence to lay a network of pipelines across sanctuaries and natural parks. Every application had to be dealt with on its own merits keeping in view the need to sustain the environment.

In conclusion, given the in depth scrutiny of the possible damage which could be caused by the laying of the pipelines and the stringent conditions imposed to obviate such possible damage, and the opinion of the expert bodies consulted, the court saw no reason to interfere with the grant of permission to lay the pipelines. The leave was therefore granted.

INDIA 5

Gunavathi Proprietrix of Decorticating Unit Vs The Chairman Tamil Nadu Pollution Control Board and The Joint Chief Environmental Engineer Tamil Nadu Pollution Control Board

High Court of Madras

Justice(s): Shah, A.P.; Chandru, K.

Case Link

Introduction:

The petitioner is the Proprietrix of Decorticating Unit registered as a Small Scale Industry and the Government of Tamil Nadu vide order dated 30.11.1989 issued a Permanent Registration Certificate for the purpose of manufacturing Groundnut Kernels and also processing of raw rice flour for "Murukku. It challenges the order of the first respondent / Chairman of the Tamil Nadu Pollution Control Board dated 02.8.2006 wherein and by which the first respondent, by exercising his power under Section 31A of the Air (Prevention and Control of Pollution) Act, 1981, issued direction to the closure of the petitioner's unit and also stoppage of electricity with immediate effect and this order is impugned in this writ petition. Inspection of the petitioner's unit was conducted on 23.3.2006 and the petitioner had not provided proper Air Pollution Control measures and the consent of the Board was also not obtained and also there are frequent complaints from the public against the dust pollution caused by the unit. It is admitted that the report of the inspection conducted on 23.3.2006 was not given to the petitioner and no show cause notice was issued before taking any action.

Legal Framework:

Water Prevention & Control Act 1974

Air Prevention and Control of Pollution Act 1981

Judicial Review of administrative proceedings

Held:

In terms of Sections 25 and 26 of the Water (Prevention and Control of Pollution) Act, 1974 and Section 21 of the Air (Prevention and Control of Pollution) Act, 1981. In these proceedings, the small industries employing less than 20, which are listed out in the annexure to the order, have been exempted from the purview of the Pollution Act. Even in the exemption order, it is stated that only if there is any objection from the surrounding Community and after verification, the facility given to the industry can be withdrawn. That is not the case in the present circumstances.

In the light of the above, the impugned order is set aside. The respondents are directed to inform the Tamil Nadu Electricity Board to restore the power connection to the petitioner's unit forthwith, if not already done. It is open to the first respondent to issue show cause notice to the petitioner in terms of law after taking into account the exemption granted to the industries in one of which the petitioner is carrying on business and after getting explanation from the petitioner and after affording opportunity to the petitioner, an order may be passed by the first respondent Board and the same may be communicated to the petitioner. If the order is adverse to the petitioner, the same shall not be given effect to, for a period of two weeks from the date of order.

INDIA 6

Gupta Enterprises Vs Delhi Pollution Control Committee and Anr.
High Court of Delhi

Justice :Ravindra Bhat., S.

Case Link

Introduction:

In these proceedings under Article 226 of the Constitution of India, the writ petitioners' common grievance is that the Delhi Pollution Control Committee, the first respondent, withdrew authorization and permission to engage in industrial activity, in terms of The Environment Protection Act, 1986, the Air (Prevention and Control of Pollution) Act, 1981 and the Hazardous Waste (Management and Handling) Rules, 1989. Petioners submitted that the impugned orders are unsustainable, because they were not preceded with show cause notice or reasonable opportunity.

The facts reveal that the Delhi Pollution Control Committee, pursuant to inspections, said to have taken place in 2005, issued the impugned orders, resulting in closure or direction to close these industrial units immediately, calling for invocation of emergency powers. Indisputably, the action was not preceded by show cause or hearing to the petitioners.

Legal Framework:

Article 226 of the Constitution of India

The Environment Protection Act, 1986

Air (Prevention and Control of Pollution) Act, 1981

Hazardous Waste (Management and Handling) Rules, 1989

Judicial Review of administrative proceedings

Held:

It is well settled that every administrative or executive order, which affects or adversely impacts on the rights of an individual, should be preceded by a fair procedure, thereby implying notice, a right to represent against the proposed action and some opportunity of hearing, unless there is imminent or irreversible injury to public interest. Moreover, there is admittedly a considerable time lag between the inspection, carried out in 2005 and the impugned order. This shows prima facie that there was no such urgency or emergency, which could be termed as 'imminent' injury to public interest if rules of natural justice were followed.

However, instead of quashing the impugned orders, the judge is of the opinion, having regard to the nature of the concerns expressed by the respondents on the public importance of the enforcement of environmental standards, that the impugned order, instead of being treated as directions or orders of closure, and/or withdrawal of authorizations/ cancellations of license, should be treated as a show cause notice. The petitioner shall file its reply to such show cause notice within 3 days. The respondent Delhi Pollution Control Committee shall grant minimum opportunity of hearing to the petitioner and thereafter issue speaking orders. The entire process shall be completed within three weeks.

INDIA 7

Punjab State Electricity Board Vs. H.P. State Environment Protection and Pollution Control Board

High Court of Himachal Pradesh

Justice(s): Gupta, D.; Ahuja, V.K.

Case Link

Introduction:

The petitioner/Board is having its Hydel Project situated in Village Shanan at Jogindernagar. It was alleged that H.P. State Environment Protection and Pollution Control Board initially issued one notice, on 29.7.1998, wherein it was alleged that the petitioner's unit was running without the control of the State Pollution Control Board under the provisions of the Water and Air Acts. It was also alleged in the notice that the petitioner's unit was discharging sewage and the petitioner was directed to obtain sanction from the State Pollution Control Board. It was further alleged by the petitioner that since he had been threatened under the provisions of the Act for legal action, he filed a statutory appeal under Section 31 of the Act of 1981 read with Section 28 of the Water (Prevention & Control of Pollution) Act, 1981, before the Appellate Authority constituted under the Air and Water Acts on 16.10.1999. These appeals were not listed for hearing before any Appellate Authority constituted under the Act and the respondent was issuing similar notices to the petitioner to cause harassment to it. It was further alleged that another notice was issued on 21.9.2004 and the respondent denied their knowledge regarding filing of the appeal by the present petitioner. In view of the fact that the petitioner was threatened with legal action vide latest notice dated 21.9.2004, he filed a reply and has prayed for a writ of certiorari for quashing of all the proceedings and action taken by the

Pollution Board and they be also restrained from taking further action under the provisions of the Water Act.

Legal Framework:

Water (Prevention & Control of Pollution) Act, 1981

Water Pollution

Held:

The scope of Sec 25 of the Water (Prevention & Control of Pollution) Act, 1974 is not limited to notifying the authorities only when the trade effluent is a polluting agent. Section 2(k) of the Act defines trade effluent to include any liquid, gaseous or solid substance discharged from the premises. Thus Section 2(k) doesn't require the effluent to be a polluting material. If any liquid, gaseous or solid substance is being discharged from the premises then there is "discharge of trade effluent" within the meaning of Section 2(k). Therefore, any solid, liquid or gaseous discharge from any of the industrial plant's outlets must be notified, as per Section 25 & 26, to the Pollution Control Board. It is up to the Pollution Control Board to give its consent for discharge only after examining it and finding it suitable. The question as to whether the water being discharged from the unit is causing pollution or not is to be considered subsequently, but all such units are required to take the consent of the Board when they discharge such liquid including water.

INDIA 8

Solanki Jaswantsinh Kalusinh Vs. District Collector and Ors.
High Court of Gujarat

Justice(s): Radhakrishnan, K.S.; Akil Kureshi.

Case Link

Introduction:

Petitioner has raised grievances about the inefficiency and the incapacity of the officers of the Pollution Control Board to control the contamination of underground water in Boriya Khurad village, causing serious health hazards. The Environmental Engineer of the GPCB in an inspection conducted on 19.04.2004 noticed that a dyeing and manufacturing unit in the above mentioned village had discharged chemical and other toxic subject into the underground bore-wells of the factory, which in turn contaminated the water in nearby bore-wells causing serious water pollution and health hazards to the villagers and farmers. The GPCB had to take strong measures due to the objections raised by the villagers and ultimately the factory was closed down, but the problems of the complainant petitioner and other villagers still subsists. The pollution caused by the 4th respondent factory is a perennial problem and the contaminated water still causes serious health hazards. The pollution already caused is still to be eradicated. Petitioner has, therefore, approached this Court seeking a direction to the authorities to take appropriate steps to check and curb the pollution of the underground water at village Boriya Khurad and to take appropriate action against the offending industrial units responsible for the pollution of the underground water and also take appropriate steps against the erring officers and also for the consequential relieves.

Legal Framework:

Water (Prevention & Control of Pollution) Act, 1981

The Environment Protection Act, 1986

Held:

The Court observes that in several cases industrial and chemical factories after polluting the bore-wells and water courses on a massive scale simply get away causing serious health hazards and environment pollution. There is no system or mechanism to meet with such situations and to determine the extent of pollution caused and to determine the damage caused. In few cases, High Courts and Apex Court have ordered compensation to the victims. But, there is no clear-cut mechanism to assess the compensation amount legitimately due to the affected persons and the damage caused to the environment. The authorities of the GPCB can take appropriate action to close down the unit, but there is no provision in Water Act or Environment Act to assess the compensation. The court laments the lack of accountability of industries due to the inability and inefficiency of the PCB in assessing damages and compensation due to lapse of time. The court observes that the compensation awarded must have a direct correlation with not just the magnitude and capacity of the enterprise, but also with the harm caused by it. The court set specific guidelines, stressing on the GPCB's responsibility to bring to the knowledge of the District Judge and District Collector for assessing compensation any environmental degradation caused by industries.

MALAYSIA 1

Lam Eng Rubber Factory (M) SDN BHD v Pengarah Alam Sekitar, Negeri Kedah Dan Perlis & anor. [2005] 2 MLJ 493

23 November 2004 Court of Appeal (Putrajaya)

Gopal Sri Ram, Abdul Aziz And Mohd Ghazali.J

[Case Link]

Introduction:

The appellant operated a rubber factory in Sungai Petani, Kedah since 1940. In November 1993, the appellant applied for the licence from the Department of Environment, Kedah. The first respondent, the director of environment for Kedah and Perlis responded in mid-February 1994, saying that the appellant's land had not been converted from agriculture to industry and for that reason the appellant's application for a licence could not be considered. In actual fact, an earlier court judgment of KC Vohrah J between the appellant and the state director, Kedah and the land administrator, Kuala Muda, Sungai Petani, Kedah had held that the appellant had not infringed the condition of the issue document of title to their land therefore, there was no necessity for the appellant to apply for a change of land user. After some correspondence and a reminder from the appellant, the department did not respond further. The following year, the appellant applied for the licence for 1995. Its application was refused, the reason given was that the area surrounding the factory had become a residential area and it was unsuitable for the appellant to carry on operations there.

The appellant was dissatisfied and appealed to the Appeal Board created by the Environment Quality Act 1974 ('the EQA). However, its appeal was purportedly refused by the first respondent. The appellant accordingly moved to the High Court for certiorari to quash the first respondent's decision. Its application failed. The High Court held that since the appellant had no licence for the year 1994 they had carried on their factory illegally and had no legitimate expectation to have a licence for 1995.

Legal Framework:

Environment Quality Act 1974 ('the EQA)

Environmental Impact Assessment

Held:

The Court held, allowing the appeal with costs, remitting the appeal to the Appeal Board and setting aside the orders of the High Court): In the first place, it was the wrongful conduct of the first respondent that led to the appellant having had no licence for 1994. The first respondent had told the appellant that the licence for 1994 was not forthcoming unless the condition of land use was altered. That objection was of no consequence in the light of KC Vohrah J's ruling. So the appellant was legitimately entitled to have the licence issued to it. Parliament had conferred upon the first respondent the discretion to decide whether to issue the licence or not. But the law requires him to exercise this power or discretion fairly, justly and without misdirecting himself on the law or the facts Any reasonable man in would have been led by the words and conduct of the first respondent to believe that the 1994 licence would be issued once the problem about the condition in the title to the land had been resolved. As for conduct, he accepted the payment made by the appellant and also did not respond at all to the appellant's reminder. Then at the hearing came the suggestion that the appellant was not entitled to relief because it carried out its operations in 1994 without a licence. There was a smacking of unfairness and injustice in administration.

The only issue that the court had to decide was whether the decision of the first respondent that the appeal could not be considered was lawful. The decision was obviously unlawful. The appellant's appeal being a matter within the jurisdiction of the Appeal Board, it was not for the first respondent to decide that the appeal could not be considered. It was for the Appeal Board to decide the fate of the appeal.

NEPAL 1

Raju Prasad Chapagain and others Vs. Government of Nepal and others. Writ No. 2959
Supreme Court of Nepal Katmandu Justice(s): Rayamajhi., B.; Shrestha, K.

Case Link

Introduction:

The petition is demanding the environment friendly disposal and management of 75 tons of highly harmful and outdated toxic wastes stored insecurely in Amalekhgunj, Bara and other parts of the nation so as to preserve the fundamental birthright of the people to live in safe, fearless and healthy environment.

Legal Framework:

Constitution of Kingdom of Nepal 2047 Articles 12(1), 23, 26(4) and 88(2)

Environment Protection Act, 2053 and Environment Protection Rules, 2054

Universal Declaration of Human Rights, 1948. Article 25

International Convention on Economic, Social and Cultural Rights, 1966 (ICESCR) Article 12

Stockholm Convention on Persistent Organic Pollutants (POPs) 2001, Article 1

Rio Declaration on Environment and Development 1992, Articles 3, 4, 5 and 6

Basel Convention on the control of Trans-boundary movements of Hazardous Wastes and their Disposal 1989 Articles 1,3, 4(2),5,6,8,9,10,12

Held:

The apex Court stated: For the subjects incorporated in the Policies of the State with a view to promote the rights to life and life in a clean environment, established as the fundamental rights, it is not only desirable but mandatory as well that the programmes of the State address to this issue. A mechanism has to be set up with enough financial and technical resources so as to compensate the damage done or likely be done to the local community and environment by the consequences of the hazardous pesticides.

The stance of international power centers and economic powerhouses of manufacturing pesticides that are extremely injurious to the flora, fauna and ecology and their propensity to shift this unwanted liability on the poor and underdeveloped nations is condemnable as well as regrettable. The international community should come forward to accept the responsibility of its ghastly mistake. When the international community is lending a helping hand, Government of Nepal should also leap forward by partnering in the process attentively, for the safe management of these pesticides which are proved to be dangerous from the perspective of welfare of mankind and environment conservation.

The natural right to life has been guaranteed and the right to life in a clean environment also has been accepted as a fundamental right in itself. Hence, the State's responsibility is witnessed in honoring, obeying and fulfilling that right. In the same manner, it is mandatory that the State has to mobilize all channels, political and diplomatic, as espoused responsibility by international treaties and conventions. This equally holds true in dealing with the circumstances induced by international community or foreign nations.

NEPAL 2

Prakash Mani Sharma v. His Majesty's Government Cabinet Secretariat and Others
WP 2237/1990
Supreme Court of Nepal Justice(s):Acharya; Parajuli

Case Link

Introduction

This case dealt with the following questions: Can environmental protection be ignored in the name of development? Does the enjoyment of personal liberty under the constitution require a pollution-free environment? Is the court entitled to ask the government to adopt particular measures for reducing pollution?

Arguing that the right to live in a healthy environment was protected under the Constitution of the Kingdom of Nepal of 1990 and several laws, the petitioner demanded the court to quash a government decision allowing unfettered import of diesel taxies from India and to issue a mandamus for protecting the environment. He argued that the decision allowing the import of these vehicles and leaded petrol had a negative impact upon human health and ultimately jeopardized the existence of the historical, cultural, and archaeological significance of the Katmandu Valley.

Legal Framework

Article 12(1) of the Constitution of the Kingdom of Nepal 1990

Held

The court emphasized that the freedom of personal liberty to every citizen was constitutionally guaranteed under the Article 12(1) of the Constitution of the Kingdom of Nepal 1990. Personal freedoms at large could only be protected by a healthy environment and it was an unquestionable fact that a polluted environment deprived the right to life protected under the constitution and the laws. A healthy environment thus was a prerequisite for the protection of the right to personal freedoms under the Constitution. Therefore the state had a primary obligation to protect the right to personal liberty by reducing environmental pollution as much as possible.

The court stressed that the demand for rapid development also could not be ignored. Nepal required an accelerated development process. At the same time, the state also had an obligation to protect the environment taking into account the negative impact of development upon the environment. Therefore, development and environment should proceed harmoniously. Environmental destruction could not be encouraged in the name of development.

Finally, taking into account the lack of implementation of its previous judgments, the court issued a directive to enforce essential measures within a maximum of two years in order to reduce vehicular pollution in Katmandu Valley and to conduct essential studies with a view to prevent vehicular pollution outside Katmandu Valley.

NEPAL 3

Prakash Mani Sharma v. His Majesty's Government Cabinet Secretariat and Others

No.3027/2009

Supreme Court of Nepal Justice(s):Balaram, K.C.

Case Law

Introduction

The following questions are to be addressed prior to taking decision on this issue:

1. Whether or not a welfare state can permit any industrial enterprise to operate under the condition that it pollutes the environment adversely affecting the health of the people? Does the environmental pollution fall under the scope of environmental justice? Or, does it not?

2. Whether or not the agencies with the responsibility of monitoring the polluting and health hazardous enterprises with the aim of regulating them under the law, should act effectively and undertake result-oriented activities?

3. Whether or not, the respondents, the government and the concerned agencies are effectively undertaking the activities directed towards regulating the legally or illegally operating brick kilns, and controlling the pollution caused by them?

4. Whether or not the writ should be issued as claimed by the petitioners?

Legal Framework:

Article 88 of the Constitution of Kingdom of Nepal

Environment Protection Act, 2053,

Environment Protection Regulation, 2054 Industrial Enterprise Act, 2049

Held:

The benefits generated by the brick kilns to the entrepreneurs, labor and the general consumers, cannot be compared with the adverse environmental impacts caused by such brick kilns. Since the brick kiln industry can be deemed as a necessary evil, it is the responsibility of all the concerned agencies and civil society to realize their responsibility and discharge their duties towards minimizing the adverse impact emanating from brick kilns

Quantitative assessment of demand of bricks in the valley and the number of brick kiln operating are to be ascertained. How many of them are registered and how many are not? What is the extent of pollution emitted by the brick kilns in the environment of the Valley? ; How much is the impact of pollution on the public health, natural resources and the cultural heritage? What are the most appropriate counteractive measures to be taken immediately as well as those to be taken in the long run? Research work aiming at those end are to be conducted.

Based on such research findings, effective techniques should be devised and followed. In addition to that, priority should be given for lessening the impact of pollution emanating from such brick kilns that are operating in the vicinity of densely populated areas, schools, cultural and touristic zones, immediate measures are to be taken to lessen adverse impact in such areas.

PAKISTAN 1

Suo Motu Case No.25/2009: Cutting of Trees for Canal Widening Project Lahore No. 25-2009

Supreme Court of Pakistan Justice(s): Jillani, T.

Case Link

Introduction:

The decision of the Supreme Court in the present case was anchored on the understanding of the doctrine of public trust. Issue framed by the Supreme Court read as under: Whether the project entailing the widening of the road on both sides of the Canal, which would have the effect of reducing the area of green belt, violated the Doctrine of Public Trust.

Legal Framework:

Doctrine of Public Trust

Protection of Green Belt areas and Heritage Parks

Held:

The Supreme Court, in its judgment, following a precedent-setting postulation of the public trust doctrine, held: "The case in hand, if examined, in the light of the Doctrine of Public Trust as explained by the academics and construed by the Courts including the Pakistan Supreme Court leads to an inescapable conclusion that the green belt around both sides of the Canal is a Public Trust resource; that it cannot be converted into private use or any other use other than a public purpose; that widening of the road as proposed is a public purpose; that a minimum area is being affected and the remaining green belt/public park is much larger; that the same has been recommended by the Mediation Committee to be declared as Heritage Park and the recommendations of the said Committee have been accepted by the Province of Punjab in totality. In these circumstances, the Doctrine of Public Trust cannot be said to have been compromised".

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

PHILLIPINES 1

Felipe Ysmael, Jr. and Co., Inc. v. The Deputy Executive Secretary, The Secretary of Environment and Natural Resources, The Director of the Bureau of Forest Development and Twin Peaks Development and Realty Corporation G.R. No. 79538 (1990) PHSC 882

Supreme Court of the Philippines Justice(s): Fernan; Gutierrez; Bidin; Courts

Case Link

Introduction:

This case dealt with the cancellation of a timber license and the question whether a court could interfere in matters which were addressed to the discretion of government agencies.

The petitioner sought the reinstatement of its timber license agreement which was cancelled in August 1983 during the Marcos administration. He stated that after the Government had made an order canceling his logging concession pursuant to presidential instructions, a part of the area was allowed to be logged by Filipino companies without a license; and, that the latter entities were controlled or owned by relatives or cronies of deposed President Ferdinand Marcos. The Ministry refused to reverse the order, ruling that a timber license was only a privilege which could be withdrawn whenever public interest or welfare so demanded.

Legal Framework:

Section 16 of Article II of the 1987 Constitution

Held:

The court held that the refusal of the respondents to reverse the final administrative orders did not constitute grave abuse of discretion. It was an established doctrine in its jurisdiction that the orders of administrative agencies had upon their finality, the force of a final judgment within the purview of the doctrine of res judicata. These decisions and orders were as conclusive upon the rights of the affected parties as though the same had been rendered by a court of general jurisdiction.

Besides that, the administrative actions were apparently in response to the growing global concern over the despoliation of forest lands and the utter disregard of their crucial role in sustaining a balanced ecological system. The legitimacy of such concern could hardly be disputed. While there was a desire to harness natural resources to amass profit and to meet the country's immediate financial requirements, the more essential need to ensure future generations of Filipinos of their survival in a viable environment demanded effective Government action to check further denudation of whatever remained of the forest lands.

There was a basic rule that the courts would not interfere in matters which were addressed to the sound discretion of government agencies entrusted with the regulation of activities coming under the special technical knowledge of such agencies. Timber licenses could be validly amended, modified, replaced or rescinded by the Chief Executive when national interests so required. The petition was dismissed. Nevertheless, the Court expressed its concern regarding alleged irregularities in the issuance of timber license agreements to a number of logging concessionaires.

PHILLIPINES 2

Alfredo Tano and others, petitioners, v. Hon. Gov. Salvador P. Socrates and others, respondents (1997) PHSC 1472

Supreme Court of the Philippines Manila Justice(s): Davide; Mendoza; Bellosillo

Case Link

Introduction:

The Puerto Princesa City authorities enacted ordinances that banned the shipment of all live fish and lobster outside Puerto Princesa City in order to effectively free the City Sea Waters from cyanide and other obnoxious substances. The ordinances covered all persons and business enterprises that were in the business or shipment of live fish and lobster. It became unlawful to ship out from Puerto Princesa City to any point of destination any live fish and lobster except sea bass, catfish, mudfish and milkfish fries. The petitioners claimed, among others, that being fishermen or marine merchants, they would be adversely affected by the ordinances.

Legal Framework

Section 2, Article XII and Sections 2 and 7 of Article XIII of the 1987 Constitution

Strategic Environmental Plan (SEP) for Palawan Act, approved on 19 June 1992

Held

The court interpreted the relevant statutory laws and regulations and emphasized that under the general welfare clause of the Local Government Code, local government units had the power, inter alia, to enact ordinances to enhance the right of the people to a balanced ecology. It likewise specifically vested municipalities with the power to penalize, by appropriate ordinances, the use of explosives, noxious or poisonous substances, electricity, and other deleterious methods of fishing; and to prosecute any violation of the provisions of applicable fishery laws. In conclusion, the petition was dismissed.

In a dissenting opinion Judge Bellosillo expressed the view that in absolutely prohibiting the catching, gathering, buying and shipment of live fishes and marine coral resources by any means including those lawfully executed or done in the pursuit of legitimate occupation, the ordinance had overstepped the reasonable limits and boundaries of its raison d'etre.

PHILLIPINES 3

Metropolitan Manila Bay Development Authority v Concerned Residents of Manila Bay G.R. Nos. 171947-48
Supreme Court of the Philippines Manila Justice(s): VELASCO JR

Case Link

Introduction

This case started when, on January 29, 1999, respondents Concerned Residents of Manila Bay filed a complaint before the Regional Trial Court (RTC) in Imus, Cavite against several government agencies, among them the petitioners, for the cleanup, rehabilitation, and protection of the Manila Bay. Raffled to Branch 20 and docketed as Civil Case No. 1851-99 of the RTC, the complaint alleged that the water quality of the Manila Bay had fallen way below the allowable standards set by law, specifically Presidential Decree No.(PD) 1152 or the Philippine Environment Code. This environmental aberration, the complaint stated, stemmed from: "The reckless, wholesale, accumulated and ongoing acts of omission or commission of the defendants resulting in the clear and present danger to public health and in the depletion and contamination of the marine life of Manila Bay, for which reason ALL defendants must be held jointly and/or solidarily liable and be collectively ordered to clean up Manila Bay and to restore its water quality to class B waters fit for swimming, skin-diving, and other forms of contact recreation. In their individual causes of action, respondents alleged that the continued neglect of petitioners in abating the pollution of the Manila Bay constitutes a violation of, among others:

Legal Framework:

Respondents' constitutional right to life, health, and a balanced ecology; The Environment Code (PD 1152); The Pollution Control Law (PD 984);The Water Code (PD 1067);The Sanitation Code (PD 856);The Illegal Disposal of Wastes Decree (PD 825);The Marine Pollution Law (PD 979);Executive Order No. 192;The Toxic and Hazardous Wastes Law (Republic Act No. 6969);Civil Code provisions on nuisance and human relations; The Trust Doctrine and the Principle of Guardianship; and International Law.

Held:

The Supreme Court of the Philippines issued for the first time a continuing mandamus through which the Authority was compelled to perform its duties in cleaning and preserving the polluted Manila Bay, and was obliged to submit quarterly progress reports to the Court for monitoring. Due to the special nature of this remedy, the Court was able to monitor the execution of its judgment until it is fully satisfied. To facilitate the cleanup, the Supreme Court created the Manila Bay Advisory Committee, headed by Associate Justice Velasco Jr, who wrote the judgment. Following this judgment, the Supreme Court of the Philippines adopted new Rules of Procedure for Environmental Cases in 2010. The new rules allow citizen suits, in which plaintiffs representing the public interest may bring environmental claims even though they did not necessarily experience any injury. These actions are permitted, so long as they are done for the protection, preservation or rehabilitation of the environment. The Environmental Rules also incorporate the recent judgment by providing for the issuance of a writ of continuing mandamus. The writ may command a party to perform acts for an unlimited period up until judgment is satisfied. Additionally, the court can monitor, or direct a government agency to monitor this execution, through whatever means necessary, including the submission of periodic progress reports to the Court.

SRI LANKA 1

Mundy vs. Central Environmental Authority and others SC Appeal 58/2003 Supreme Court of the Democratic Socialist Republic of Sri Lanka Justice(s): Fernando; Ismail; Wigneswaran

Case Link

Introduction:

The Government of Sri Lanka had decided to construct the Southern Expressway in order to link Colombo and Matara. The parties to the appeals in this case agreed that the project itself was of national importance, but the appellants complained in regard to the proposed route of the Expressway, which adversely affected their lands. The Court of Appeals had dismissed all applications. The petitioners appealed to this Court.

The Central Environmental Authority had approved the trace subject to numerous conditions, including that the project proponent should obtain fresh approval in respect of any alterations that were intended to be made to the project. Thereafter, the project proponent prepared what was described as the "Final Trace". The Appellants complained that they were denied an opportunity of being heard before the adoption of the final trace, that there was no supplementary Environmental Impact Assessment, and that approval by the Central Environmental Authority was not obtained for the final trace.

Legal Framework:

National Environment Act, No 47 of 1980 as amended by Act No 56 of 1988 ("the Act")

Regulation 17 of the National Environmental (Procedure for approval of projects) Regulations No 1 of 1993

Held:

The Supreme Court considered the relevant legislation, the authority's power to grant approval, the rights of the appellants to notice and to be heard in regard to "deviations" that were made to the original proposal, and the power and the discretion of this Court in regard to the grant of relief.

The court was of the view that the purposes of an Environmental Impact Assessment would not be achieved if changes to the proposal were treated as not being alterations. The Appellants were entitled to notice and to be heard before the final trace was approved. It emphasized that the Court of Appeal seemed to agree that the rights of the Appellants had been infringed. While the circumstances were such that the Court could reasonably have concluded that, on balance, the final trace should be left undisturbed; one of the major considerations was cost. If a judicial discretion was exercised in favour of the State, inter alia, to save costs, it was only equitable that the appellants should have been compensated for the injury to their rights.

If it was permissible in the exercise of a judicial discretion to require a humble villager to forego his right to a fair procedure before he was compelled to sacrifice a modest plot of land and a little hut because they were of "extremely negligible" value in relation to a multi-billion rupee national project, it was nevertheless not equitable to disregard totally the infringement of his rights: the smaller the value of his property, the greater his right to compensation.

The court concluded that the deviations proposed by the project proponent were alterations requiring approval by the Central Environmental Authority; that despite the lack of such approval, the refusal of relief by way of writ, in the exercise of the Court’s discretion was justified; but that the Appellants ought to have been compensated for the infringement of their rights. To that extent, the appeals were allowed, and the court granted an order directing to pay compensation to the appellants.

SRI LANKA 2

Tikiri Band Bulankulama and others (Petitioners) v The Secretary, Ministry of Industrial Development and others (Respondents) S.C. Application No. 884/99 (F.R.) Supreme Court of the Democratic Socialist Republic of Sri Lanka Justice(s): Amarasinghe; Wadugodapitiya; Gunesekara

Case Link

Introduction:

The Sri Lanka Government wanted to conclude an agreement with a company for the manufacture of phosphate fertilizer using local deposits of apatite. The applicants petitioned the court to stop the proposed agreement claiming that their lands would be destroyed if the project was implemented and about 2,600 families were likely to be permanently displaced from their homes and lands. The respondents countered that this apprehension was unjustified because the signing of the agreement would only lead to exploration and feasibility studies and the approval of the secretary would have to be obtained before the company could proceed with the construction and mining phases of the project.

Legal Framework

Stockholm Declaration 1972

Rio Declaration 1992

Held:

The court held that mining might have more devastating consequences than exploration. However, the definition of "exploration" in the proposed agreement included the search for certain minerals, and their location, nature and grade, inter alia by making "boreholes, test pits, trenches, surface or underground headings, drifts or tunnels. Exploration was therefore not so harmless as to cause the appellants no apprehension of imminent harm to their homes and lands.

The court also examined the proposed project under the aspects of sustainable development and intergenerational equity expressed in the Rio Declaration and the Stockholm Declaration. It emphasized that "Admittedly, the principles set out in the Stockholm and Rio De Janeiro Declarations are not legally binding in the way in which an Act of our Parliament would be. It may be regarded merely as 'soft law'. Nevertheless, as a Member of the United Nations, they could hardly be ignored by Sri Lanka. Moreover, they would, in my view, be binding if they have been either expressly enacted or become a part of the domestic law by adoption by the superior courts of record and by the supreme Court in particular, in their decisions.

The reliability of the proposed project had been considered in deciding whether there was an imminent infringement of the appellants' rights. The court found nothing in the agreement to show that the signing would only result in exploration and a feasibility study and the applicants were entitled to be apprehensive.

The court ordered the respondents to desist from entering into the proposed agreement pending a comprehensive Environmental Impact Assessment Study.

SRI LANKA 3

Public Interest Law Foundation v. Central Environmental Authority and Another C.A. 981/99

Court of Appeal Justice(s): Gunawardena

[Case Link]

Introduction

The Petitioner sought a Writ of Certiorari to quash the decision of the Central Environmental Authority (C.E.A) approving the construction of the Southern Expressway linking Colombo to Matara on the basis that there was a failure to analyse or consider reasonable and environmentally friendly alternatives and the Environmental Impact

Assessment Report did not provide adequate reasons for the rejection of alternatives to the Project.

Legal Framework:

Environmental Impact Assessment

National Environment Act, No 47 of 1980 as amended by Act No 56 of 1988 ("the Act")

Held:

The Court of Appeal was of the view that it was not wholly correct to say that alternatives in place of the proposed project had not been considered, for in the Environmental Impact Assessment Report alternatives had been assessed or evaluated. There was also no merit in the second point abovementioned, in that the Environmental Impact Assessment report, in fact, gave reasons for rejecting the alternatives to the "Southern Expressway".

The court emphasized that it was ill equipped, in any event, to form an opinion on environmental matters - they being best left to people who had specialized knowledge and skills in such spheres. Even if a matter may seem to be preeminently one of public law, the Courts could decline to exercise review because it was felt that the matter was not justiciable, i.e. not suitable to judicial determination. The reason for non - justiciability was that judges were not expert enough deal with the matter.

If the court were to consider the validity of reasons or the feasibility of the project, it would be substituting its own views for those of the experts or of the decision maker which, in this instance, was the Central Environment Authority. Under the judicial review procedure, it was not open to the court to substitute its own views for that of the Central Environment Authority which had thought it fit to accept the recommendation of experts who had recommended "Southern Expressway" as the best of all options or schemes. The court could not quash such a decision unless it was characterized by an illegality or was a decision reached in breach of rules of natural justice etc.

Decision making was an important aspect of the work entrusted to the Central Environment Authority. Any person endowed with decision making powers would appreciate that discretion was an aid to the exercise of these powers. The court was not of the view that the discretion had been abused in any way by the Central Environment Authority. For the aforesaid reasons the application was dismissed.

SRI LANKA 4

Hettiarachchige Premasiri and others v. Dehivala-Mount Lavinia Municipal Council

Case No.46086

Mount Lavinia Magistrate Court Justice(s): Sumitrapala

Case Link

Introduction

The petitioners stated that during around five years of time the respondents were dumping garbage in their area causing ill health, insect problems with rapid growing of mosquitoes and flies and polluted well water by mixing garbage with rain water. Further they stated that although they had informed the relevant authorities about this nuisance no step had been taken to solve the problem. Hence they pleaded for a Conditional Order halting this dumping of garbage, to make the said Conditional Order absolute and for an Interim Injunction to destroy the already dumped garbage with care.

The public health instructor in charge stated that Dengue mosquitoes grew in the water and that removing garbage was a public service, which would create a greater nuisance if not done. It was stated that people living in the petitioners' houses were facing illnesses because of the stink from the garbage. The well water was getting polluted by garbage left there by birds and other animals. Furthermore it was stated that diseases were being spread with the increase in mosquitoes and flies.

Legal Framework:

Sec.98.1 of the Criminal Procedure Code

The right to a clean and Healthy Environment

Held:

The court was of the view that there was evidence that the petitioners' houses were absolutely affected by this dumping of garbage. Both parties had accepted that a large amount of garbage was being dumped there every day. The court was not satisfied that the facts presented by the respondents were sufficient enough to set aside the interim Order. Furthermore, since the respondents had a long time to remove this nuisance but had failed to take any step towards a solution the court ordered the said Order to be an absolute Order. Furthermore the court ordered to cover the remaining garbage with soil so that the stink would be removed, to remove the said nuisance and to report to the court before two months.

UNITED KINGDOM 1

Ministry of Defence v AB & Ors [2012] UKSC 9 On appeal from: [2010] EWCA Civ 1317 United Kingdom Supreme Court London

Justice(s): (Lord Phillips, Lord Walker, Lady Hale, Lord Brown, Lord Mance, Lord Kerr, and Lord Wilson.)

[Case Link]

Introduction

Between Oct 1952 and Sep 1958, the British Government carried out 21 atmospheric nuclear tests in Australia and on Christmas Island in the Pacific Ocean. A group of 1011 claimants, the majority of them servicemen involved in the tests or their representatives, claimed damages for the adverse consequences to health allegedly resulting from exposure to ionizing radiation. The claims were made subject to a Group Litigation Order because they gave rise to common or related issues of fact or law, and a group of ten lead claimants was selected for trial on the limitation issue. The claimants argued that their claims could not be time-barred under the provisions of the Limitation Act 1980, s 11(4) because they did not have the requisite knowledge to bring claims until June 2007, when a report by Dr Rowland demonstrated abnormal chromosomal changes in blood samples of some of the servicemen involved in the nuclear testing. At first instance five claimants were held to have issued within the limitation period and Foskett J exercised his discretion under the

Limitation Act 1980, s 33 to allow these claims to proceed. The Court of Appeal held that nine of the claimants had acquired the requisite knowledge more than three years before proceedings were commenced, and that none of these nine claims should be allowed to proceed. The claimants appealed.

Legal framework

Limitation Act 1980

Waste & hazardous substances; liability/compensation

Held

It was held that it was a legal impossibility for a claimant to lack knowledge of attributability for the purposes of the Limitation Act 1980 after issuing a claim, and that the correct test for when a claimant was likely to have developed the requisite state of mind to amount to “knowledge” for the purposes of s 14 of the 1980 Act was when he first came to reasonably believe the link between the facts and his injury, that is to say, held a belief which is more than a mere suspicion and is held with sufficient confidence to justify that he should reasonably begin an investigation into whether he had a valid claim. The Supreme Court dismissed the appeal by a 4-3 majority (Hale, Kerr and Phillips dissenting).

UNITED KINGDOM 2

Barr & Ors v Biffa Waste Services Ltd [2012] EWCA Civ 312
Court of Appeal London

Justice(s): Arden; Carnwath and Patten.

[Case Link]

Introduction:

The group action involves 152 households who allege that the odour from the Westmill II Landfill site in Ware, Hertfordshire, has seriously affected their quality of life. In many cases residents stated they were prevent from being able to open their windows or use their gardens as they wish due to the odour nuisance from the Westmill Landfill site. The claims range over five years from when the site first accepted waste in July 2004 until October 2009. Biffa sought to argue, amongst other things, that the operation of the site pursuant to the terms of a permit gave rise to a defence of statutory authority.

At first instance, the Judge held that the correct test was whether Biffa was a "reasonable user" and the nuisance claim failed on that basis because Biffa had complied with its permit and had not acted negligently. He also noted that, in any event, a threshold of at least one complaint per week concerning the odorous smells had not been satisfied. The Claimants appealed.

Legal Frame work:

Environmental Protection ACT 1990 section 33,79, 80(7).

Polsue and Alfieri v Rushmer [1907] AC 121 (CA [1906] 1 Ch 234)

Halsey v Esso Petroleum Co Ltd [1961] 1 WLR 683, 695-6

Allen v Gulf Oil Refining Ltd [1981] AC 1001

Held:

Court of Appeal held that compliance with environmental permit is no defence to nuisance claim. Nuisance is traditionally defined as an unreasonable interference with a neighbor's comfortable and convenient enjoyment of their land. There must, therefore, be a real interference, taking location into consideration. As well as ruling that there was no requirement to set a threshold of the number of complaints that a resident would have to make before a nuisance was recognized as actionable, the Court of Appeal also confirmed that in deciding whether a use of land was "reasonable", regard had to be had, only to the question of what "an ordinary person could reasonably be expected to put up with. "This was the longstanding common law test. An examination of the terms on which a defendant is using its land (i.e. via an environmental permit) was not necessary.

The Court of Appeal also dismissed Biffa's cross appeal that it had statutory authority to commit a nuisance courtesy of its operating permit from the Environment Agency, and was thus immune from common law private nuisance claims.

UNITED KINGDOM 3

R v Thames Water Utilities Ltd [2010] EWCA Crim 202
Court of Appeal London

Justice(s): MOORE-BICK; DAVID CLARKE; SWEENEY

Case Link

Introduction:

Thames Water appealed a fine of £125,000 imposed upon it for causing polluting matter to enter controlled waters, contrary to Section 85(1) Water Resources Act 1991, following the release of a large quantity of bleach into the River Wandle, which caused significant harm to fish stocks as well as flora and fauna. Thames Water entered a guilty plea, accepting full responsibility for the incident, and in an effort to mitigate the effects of the spill, also pledged £500,000 in compensation to restore the river. At first instance, the Recorder of the Crown Court acknowledged that Thames Water had accumulated 82 previous convictions since 1991 for offences in connection with the discharge of sewage from its premises. In sentencing she concluded that the starting point for a fine, based upon conviction at trial, would have been £250,000, but she reduced this by 50% to £125,000 on account of the guilty plea and mitigation.

Thames Water appealed the fine on the basis that the Recorder took too high a starting point gave too much weight to its previous convictions and took insufficient account of the amount of money pledged in reparation.

Legal Framework

Water Resources Act 1991 Section 85(1)

R v Anglian Water Services Ltd [2003] EWCA Crim 2243

Held

The Court of Appeal allowed the appeal, holding that a fine of £125,000 was manifestly excessive and that a fine of £50,000 was appropriate taking into account the available guidance and previous cases on environmental sentencing.

The Court upheld the ruling in R v Anglian Water Services Ltd [2003] EWCA Crim 2243 that statutory water companies such as Thames Water are subject to a heavy burden to ensure they do not cause the escape of polluting materials from sewage treatment plants into controlled waters. However, the Court acknowledged that there was also a clear policy need to encourage the making of voluntary reparation by offenders, while at the same time ensuring appropriate punishment and deterrence.

The Court held that the appropriate level of punishment in cases such as Thames Water, where there is a guilty plea to a single offence, must be decided on the facts of each case, albeit guided in significant part by the principles in Anglian Water, and by the adoption of a six-step principled approach: Assess the seriousness of the offence by reference to its facts, including aggravating and mitigating features. Consider the defendant's means and identify the amount of a notional fine as it would be after a trial. Consider making a compensation order, and the extent to which this should be in addition to, or deducted from, the notional fine. Consider the extent to which the defendant had learned lessons from the incident or made voluntary reparation, and reflect this by a reduction in the level of the deterrent element of the notional fine. Consider any other mitigating features. Apply the appropriate percentage discount for a guilty plea.

In terms of aggravating and mitigating features, the Court noted that there was a large degree of overlap with those that applied to health and safety cases, but added that in environmental cases specific aggravating features would include: Whether the pollutant was noxious, widespread or pervasive, or liable to spread widely or to have long–lasting effects; Whether human health, animal health or flora were adversely affected especially where a protected species was affected, or where a site designated for nature was affected; Whether an extensive cleanup operation, site restoration or animal rehabilitation operation was required; and Whether other lawful activities were prevented or significantly interfered with.

UNITED KINGDOM 4

Dobson & Ors v Thames Water Utilities Ltd and Anor. [2009] EWCA Civ 28
Court of Appeal London

Justice :Waller; Richards; Hugues.

[Case Link]

Introduction:

This is an appeal from the High Court to the Court of Appeal regarding certain decisions of the Technology and Construction Court (TCC). That trial was of 14 preliminary issues in claims by owner-occupiers and simple occupiers of properties near Mogden Sewage Treatment Works arising out of odours and mosquito infestations in negligence and private nuisance and seeking also damages under human rights legislation, Thames Water having accepted that it was a public authority for the purposes of the Human Rights Act 1998. The claims raised novel issues concerning the relationship between the statutory public law system of control under the Water Industry Act 1991 and private common law claims. High Court held that the statutory system of control of sewerage undertakers denied a remedy to anyone (owner or occupier) in the absence of negligence. He also held that damages for transitory nuisance were to be assessed on the basis of diminution of the amenity value of the land and that such an award would usually amount to 'just satisfaction' of the claims of other occupiers for the purposes of section 8 of the Human Rights Act 1998.

There was an appeal on three issues: (1)where damages in nuisance are awarded to a property owner, is it necessary, in order to afford 'just satisfaction' to a non-property-owning member of the same household (such as a child of the owners), to award damages under section 8 of the Human Rights Act 1998 for breach of Article 8 European Convention on Human Rights; (2)were alternative remedies in public nuisance and/or through Ofwat relevant to the first issue?; (3)if common law damages for nuisance are lower than those obtainable under the Human Rights Act 1998, can they be 'topped up?

Legal Framework

Human Rights Act 1998

Water Industry Act 1991

Human Rights Act 1998

Held:

The claimants' principal argument – that an award of damages in nuisance to the owners was completely irrelevant to a section 8 the Human Rights Act 1998 claim for breach of Article 8 (which was wholly distinct in character and related to the effect upon an individual) – was rejected. The Court of Appeal held that damages under section 8 of were 'not an automatic entitlement but ... a remedy of last resort. The case of a child whose parents had recovered damages in nuisance as owner-occupiers required findings of fact before a conclusion could be reached on whether an award to the child under section 8 was (as it must be) ‘necessary’; if the award to the parents had taken into account the effect upon their child of the loss of amenity, that was certainly relevant and a ‘highly significant consideration’ in relation to the child’s section claim; a declaration might well suffice. The court further held that the proper award to an owner under section 8 is ‘most unlikely’ to exceed the common law award; a ‘top up’ award is ‘highly improbable, if not inconceivable’. On issue (2), given all of the above, the existence of alternative domestic remedies would only fall to be considered as a factor in the case of a claimant who had both shown that a section 8 award was otherwise necessary and had proved negligence, so it was ‘very doubtful’ that the existence of those remedies would militate against such an award in those circumstances.

AUSTRALIA 1

Minister for the Environment & Heritage v Greentree (No 2) [2004] FCA 741
FEDERAL COURT OF AUSTRALIA

Sackville J.

[Case Link]

Introduction:

The Australian Government Department of the Environment and Heritage (DEH) became aware of clearing of the Windella Ramsar site in September 2002. The site was part of the Gwydir Ramsar Wetland, listed under the Ramsar Convention in 1999.

DEH inspected the site in late 2002 and found 20% of it cleared. Following the inspection DEH tried to negotiate rehabilitation of the site but did not initiate legal proceedings to prevent further clearing.

A further inspection by DEH in July 2003 found that 100% of the site had been cleared, an area totaling 100 hectares. Legal proceedings were then commenced.

In the first stage of this case, the Commonwealth Minister for the Environment & Heritage sought and was granted an urgent, interim injunction (on an *ex parte* basis) to restrain the farmers from continuing to contravene section 16 of the Environment Protection and Biodiversity Conservation Act (EPBC Act) by preparing the site for the planting of a wheat crop.

The farmers then applied to the Court for the interim injunction to be dissolved. Sackville J refused that application and the matter proceeded to trial.

At trial the farmers did not dispute that they had cleared and ploughed an area in preparation for planting a wheat crop but they disputed this contravened the EPBC Act. Their defence was based on three main arguments:

- the cleared site was not validly designated as a Ramsar Wetland under the EPBC Act;
- clearing vegetation and growing of wheat on the site was lawful due to section 43A of the EPBC Act, which permitted actions fully approved at the commencement of the Act on 16 July 2000 to proceed without further approval under the Act; and
- in the alternative, the clearing did not have a significant impact on the Ramsar wetland.

Legislative framework:

Convention on Wetlands of International Importance especially as Waterfowl Habitat done at Ramsar, Iran on 2 February 1971 (Ramsar Convention)

Environment Protection and Biodiversity Conservation Act 1999 section 16 and 17

Held:

The court dismissed the arguments raised by the farmers and found that they had contravened section 16 of the EPBC Act.

Sackville J. granted an injunction restraining the farmer's activities and requiring them to rehabilitate the wetland. His Honor also awarded pecuniary penalties totaling $450,000 against a company director and the company responsible for the clearing, plus costs.

The farmers appealed against these decisions but the Full Court of the Federal Court dismissed their appeal in *Greentree v Minister for the Environment and Heritage [2005] FCAFC 128 (13 July 2005)*

AUSTRALIA 2

Waratah Coal Inc v Minister for the Environment Heritage and the Arts [2008] FCA 1870

Federal Court of Australia Melbourne

Collier J.

[Case Link](#)

Introduction:

This case involves judicial review proceedings in the Federal Court of Australia undertaken in 2008 by Waratah Coal Inc against a refusal of a $5.3 billion coal mine, railway and port by the Federal Environment Minister. The proposal was referred on 31 July 2008 to the Minister, under the Environment Protection and Biodiversity Conservation Act 1999. The project involved establishing a major new coal mine, railway and port to export coal for electricity production. The coal was to be sourced from Waratah Coal's mining tenements near the town of Alpha in the Galilee Basin, Central Queensland.

The proposal involved the construction of a major new coal export port in the Shoalwater and Corio Bay Ramsar wetlands, an undeveloped part of the Queensland coastline though part of a military training area. The area was listed as a wetland of international significance under the Ramsar Convention. The Minister rejected the proposal on 15 September 2008 under s 74B of the EPBC Act, as it would have clearly unacceptable impacts on the internationally recognised Shoalwater and Corio Bay Ramsar wetlands and the high wilderness value of Shoalwater which is acknowledged in its Commonwealth Heritage listing.

Waratah Coal applied for judicial review of the Minister's decision, arguing that the decision was invalid because it was outside of the time limit imposed by the EPBC Act. The application for review included a number of grounds, each of which was based on the allegation that because the 'clearly unacceptable' decision was made more than 20 days after the referral was received it was invalid, and the minister must instead make a decision pursuant to section 75 of the EPBC Act that the action is a 'controlled action'.

Legal Framework:

Environment Protection and Biodiversity Conservation Act 1999

Convention on Wetlands of International Importance especially as Waterfowl Habitat done at Ramsar, Iran on 2 February 1971 (Ramsar Convention)

Held:

The court rejected the applicant's arguments and dismissed the application with costs. The Judge ruled: “Notwithstanding the detailed submissions of the applicant, a plain reading of the EPBC Act demonstrates clearly that failure of the Minister to comply with a time limit prescribed by the EPBC Act does not affect the validity of a decision under the Act made outside a set time limit, including decisions made under s 74B. No contortion of the legislation or speculation as to the manner in which s 74B is to be construed in the broader context of Ch 4 Pt 7 detracts from the natural and ordinary meaning of the words in s 156(3) and s 518(1) EPBC Act [which provide that failure to comply with a time limit set in the Act does not affect the validity of a decision]".

AUSTRALIA 3

Minister for Environment Heritage and the Arts v Lamattina [2009] FCA 753
Federal Court of Australia Adelaide

Mansfield J.

Case Link

Introduction:

This case involved a civil prosecution in the Federal Court of Australia of a South Australian farmer for clearing 170 eucalyptus trees, thereby causing a significant impact on a threatened species contrary to section 18 of the Environment Protection and Biodiversity Conservation Act 1999. Some of the cleared trees contained nesting hollows for the South-Eastern Red-Tailed Black-Cockatoo, which is listed as endangered under the EPBC Act. Loss of nesting trees due to clearing is considered a key threat for the species and avoiding further clearing is one of the main actions in the recovery plan for the species. The defendant farming company admitted an offence had occurred and consented to a declaration being made and pecuniary penalty being imposed. The Minister and the company agreed that an appropriate penalty was $110,000.

Legal Framework:

Environment Protection and Biodiversity Conservation Act 1999

Held:

Mansfield J refused to accept the parties' agreement on the appropriate penalty and held:" ... in my view the penalty proposed by the joint submissions is not within the permissible range. The contravention was not within the least serious category of contraventions. The deliberate nature of the conduct, the indifference to its potential consequences, and its significance in relation to the endangered species, and the need for the Court to fix a penalty which will operate as a deterrent to those who might otherwise be minded to clear native vegetation contrary to s 18(3) of the EPBC Act all point to a penalty significantly greater than that suggested, even taking into account all the matters which weigh in the first respondent's favor to fix a low pecuniary penalty. In my judgment, the appropriate pecuniary penalty is $220,000

Comment:

This judgment is significant for highlighting that deliberate offences against the EPBC Act undertaken for commercial gain can be heavily punished. That is important for deterring others from contravening the Act.

AUSTRALIA 4

Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd [2010] NSWLEC 144

New South Wales Land and Environment Court

Pain J.

[Case Link]

Introduction:

The Defendants, were each charged with an offence against s 118D (1) of the National Parks and Wildlife Act 1974 (the NPW Act) in that, from about 19 March 2007 to about 30 March 2007 on land at Taylors Beach in New South Wales (the property), each by act or omission caused damage to the habitat, not being critical habitat, of a threatened species knowing that the land concerned was habitat of that kind. Mr Fish has been charged in his capacity as a director of Orogen Pty Ltd by reason of s 175B (1) of the NPW Act.

The property is approximately 10ha in size. Eight hectares are zoned 4(a) Industrial and 2ha is land zoned 1(a) Rural under the Port Stephens Local Environment Plan 2000 (the LEP). The threatened species is Phascolarctos cinereus (koala), and the damage was the felling or mulching of vegetation forming the habitat of the koala. Part 8A of the NPW Act (Threatened species, populations and ecological communities, and their habitats, and critical habitat) contains s 118D Each Defendant has pleaded guilty and has therefore admitted the essential elements of the offences. The offence is one of strict liability so that mens rea is not an element of the offence.

Legal Framework:

Native Vegetation Act 2003

Criminal Procedure Act 1986

Threatened Species Conservation Act 1995

National Parks and Wildlife Act 1974

Held:

Orogen and Mr Fish both pleaded guilty. Orogen and Mr Fish were fined a total of $15,000. The company was also ordered to pay the prosecutor's costs and investigation expenses.

Comment:

This case is significant as it not only demonstrates that the Department of Environment and Climate Change's willingness to prosecute an individual for breaching environmental laws in addition to the punitive approach it takes against corporations, but also the fact that the Court placed significant weight on the deterrence effect in its sentencing considerations..

AUSTRALIA 5

Wildlife Protection Association of Australia Inc. and Minister for the Environment, Heritage and the Arts and Director-General of the Department of Environment and Climate Change (NSW) [2008] AATA 717
Administrative Appeals Tribunal Sydney

Hack J. & Hawcroft J.

Case Link

Introduction:

On 19 December 2006 the then Minister for the Environment and Heritage made a declaration pursuant to s 303FO (2) of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act) that the "New South Wales Commercial Kangaroo Harvest Management Plan 2007-2011" was an approved wildlife trade management plan as that expression is used in Part 13A of the EPBC Act. The Plan deals with four species of kangaroo the red kangaroo (Macropus rufus), the western grey kangaroo (Macropus fuliginosus), the eastern grey kangaroo (Macropus giganteus) and the wallaroo (Macropus robustus erubescens and Macropus robustus robustus).

The applicant, the Wildlife Protection Association of Australia Inc., seeks a review in this Tribunal of the Minister's decision. The Director-General of the New South Wales Department of Environment and Climate Change, who propounded the Plan and sought the declaration by the Minister, was a party to the proceedings and generally adopted the arguments put on behalf of the Minister. The Plan replaces the "New South Wales Kangaroo Management Program 2002-2006", which was the subject of earlier proceedings in the Tribunal.

Legal Framework:

Environment Protection and Biodiversity Conservation Act 1999 s 303FO (2)

National Parks and Wildlife Act 1974 (NSW)

Held:

The Administrative Appeals Tribunal delivered its final decision on 2 December 2008. The former minister's decision was affirmed and the Tribunal recognized that the harvest was sustainable and met the animal welfare requirements of the EPBC Act. However, the Tribunal was concerned that the management plan did not include adequate response measures to an unusual decline in population numbers and the plan was amended to include trigger points and the actions to be taken when the trigger points are met.

AUSTRALIA 6

Minister for Sustainability Environment Water Population and Communities v Debono [2010] FCA 1497
Federal Court of Australia Sydney

Rares J.

Case Law

Introduction:

On 31 March 2010, eucalyptus microcarpa and derived native grasslands were placed under the 'endangered' category in the list of 'threatened ecological communities under s 181 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth). During an inspection carried out on 6 May 2010 of the eastern paddock of the Parwan farmland, Mr Debono was told to stop all rock removal and vegetation clearing until advised otherwise by the Department. Observations of the western paddock at this time demonstrated the appearance of no rock removal or vegetation clearing as having taken place. On 22 July 2010, inspections carried out with an ecological expert appeared to show large portions of ploughed land in the western paddock. The ecological expert later prepared a report indicating approximately 43 hectares in the western paddock had been disturbed by ploughing undertaken in July 2010.

Mr Debono was informed it was likely at least one ecological community protected by environmental law was within his property and it was strongly suggested he should cease further work. In a letter to the Department, Mr. Debono said he sought advice from local council whether a permit was required for rock removal and was informed the permit wasn't necessary. During a further inspection on 14 December 2010 it was observed that the western paddock had been subject to significant clearing and rock removal compared to previous inspections.

Legal Framework:

Environment Protection and Biodiversity Conservation Act 1999 s 181

Held:

The Judge found the evidence submitted by the Minister for the Department of Sustainability Environment Water Population and Communities had provided sufficient likelihood of success to justify injunctive relief and if ploughing and rock clearing were left to continue it may fundamentally change the present nature of the ecological community indentified on the property. He ordered an interim injunction prohibiting activities on a farmland in Parwan, Victoria on that basis of disturbance to the ecological community eucalyptus microcarpa.

AUSRALIA 7

Department of Environment and Climate Change v Olmwood Pty Limited [2010] NSWLEC 15
Land and Environment Court of New South Wales

Pain J.

[Case Link]

Introduction

Local residents, officers of Taree City Council and Hunter-Central Rivers Catchment Management Authority, and officers of the Department of Environment and Climate Change (DECC) gave evidence of serial clearing of the subject site over a number of years. Expert evidence on the date of European settlement and botanical pre-existence was called by the prosecutor. Part of the subject site had previously been occupied for sand mining under a mining lease held by earlier proprietors. Stereoscopic (3-D) viewing of aerial photography and SPOT5 satellite imagery showed signs of vegetation removal and soil disturbance; however regrowth activity could have masked the full extent of clearing. The defendant did not dispute any evidence in relation to aerial photography or SPOT5 imagery, however did dispute the extent of clearing alleged to have occurred in late 2006. In December 2006 the company planned to develop the land into a golf course but had no approval to undertake the clearing. It now wants to build a manufactured home 'village' on part of the land. The parties disputed the evidentiary onus for establishing whether re-growth had been cleared. Olmwood Pty Limited pleaded not guilty to a charge of clearing native vegetation contrary to s 12(1) of the Issues: (1) whether the prosecution was able to establish the elements of the offence; and (2) who bears the evidentiary onus for establishing whether the vegetation that has been cleared was "regrowth" as defined in s 9 of the NV Act.

Legal Framework:

Native Vegetation Act 2003 section s 5, 6, 7, 9, 10, 12, 13, 18, 19, 36, 44

Environmental Planning and Assessment Act 1979 s 76, 76A, 76B, 79C, 80, 80A

National Parks and Wildlife Act 1974 s 98

Protection of the Environment Operations Act 1997 s 144

Threatened Species Act 1997

Held:

Justice Pain convicted and fined the company $100,000 and ordered it to pay the prosecutor's legal costs. The Judge said she considered Olmwood acted recklessly in relation to the clearing by not making sufficient inquires as to whether or not it needed approval to clear the vegetation. In imposing such a large fine, she said that the illegal clearing of native vegetation for profit or to save the cost of obtaining approvals, increases the seriousness of the crime.

NEW ZEALAND 1

Royal Forest and Bird Protection Society of New Zealand Inc v Waitaki District Council 2012] NZHC 2096
High Court of New Zealand Justice(s): French

[Case Link]

Introduction:

In the present decision the High Court considered an application for judicial review by the Royal Forest and Bird Protection Society of New Zealand Inc (F&B). F&B challenged the validity of a certificate of compliance (CoC) granted by the Waitaki District Council (Council) to Five Rivers Ltd (Five Rivers) under section 139 of the Resource Management Act 1991 (RMA). The CoC purported to certify a number of farming activities as permitted activities, including crop production and arable farming, irrigation and ancillary building construction. F&B argued that the Council failed to assess whether those activities were permitted activities in terms of the District Plan rules controlling indigenous vegetation clearance.

The CoC was expressed to be subject to a condition that "the conditions in rules 4.4 and 4.5 of the Plan are complied with", which included Site Development Standard 4.4.8, which set controls for the clearance of indigenous vegetation. Five River stated in its application that it would comply with Rule 4.4.8. F&B argued that the Council had insufficient information to enable it to be satisfied that Rule 4.4.8 would be complied with and that further inquiries should have been made before the CoC was issued. Having examined section 139 and the corresponding case authorities, the Court concluded that the Council had acted unlawfully in issuing the conditional CoC to Five Rivers. It stated that, "having regard to the nature and scale of the proposed activities and the scale of possible indigenous vegetation suggested by the plans, it was incumbent on the Council to do more than just rely on the bare assertion of the applicant". The Council was required to satisfy itself as to what the activities actually involved, including whether any vegetation clearance was proposed and, if so, whether it would breach Rule 4.4.8.

Legal Framework:

Resource Management Act 1991 section 139

Held:

The Court found that the Council should have required a qualitative botanical survey detailing the indigenous vegetation present. It also needed to assess: If crop production and arable farming activities included clearance of indigenous vegetation, how these activities complied with Rule 4.4.8; The scale of ancillary buildings and any evidence that demonstrated that the construction of these buildings would not clear indigenous vegetation beyond the thresholds in Rule 4.4.8; and Whether there was any proof that clearance beyond the thresholds specified in Rule 4.4.8 was in accordance with an exemption relating to track maintenance. Accordingly, F&B's application for judicial review was granted, and the Court made a declaration that the Council's decision to grant the CoC was invalid and made an order quashing that decision.

NEWZEALAND 2

Whangamata Marina Society Inc (Plaintiff) v The Attorney-General of New Zealand (Defendant) CIV 2006-485-000709

High Court of New Zealand Justice(s): Fogarty J.

Case Link

Introduction:

This case dealt with the scope of powers of the Minister of Conservation in deciding about coastal permits. The plaintiff sought judicial review of a decision of the Minister of Conservation refusing to grant two coastal permits required for the coastal activities for the plaintiff's proposed marina. The activities in question were, among others, to contain four hectares of the coastal marine zone, to dredge a marina basin and channel, and to place fill onto a salt marsh for development of a parking area.

The plaintiff argued, among others, that the Minister exceeded the scope of his powers, as his decision was based on a re-evaluation and re-determination of the evidence that had been considered by the Environment Court before.

Legal Framework:

Resource Management Act 1991

Held:

The court analyzed the regulatory framework regarding the Ministers' powers of assessment and decision-making under the Resource Management Act 1991. It analyzed, inter alia, the following questions: To what extent does the Minister have the power to reconsider the findings of the Environment Court? If the Minister can reconsider the evidence, did he do so fairly in this case? Was the Minister biased by way of predetermination? Was the Minister's decision so irrational that it should be set aside upon that ground?

It concluded that Parliament had reserved to the Minister discretion to differ from the report of the Environment Court. But it was not the function of the Minister to hear witnesses and test the quality of the evidence. That was what the Environment Court did. However, the Minister had set about the task of reconsidering evidence, a power Parliament had not entrusted to him. That was an error of law. The Minister of Conservation's decision was therefore set aside. The Minister was directed to reconsider the whole matter to which the two restricted coastal activity applications related.

NEW ZEALAND 3

Green Peace New Zealand, Appellant, and Northland Regional Council, Respondent, and Mighty River Power Limited, Applicant CIV 2006-404-004617
High Court of New Zealand Justice(s): Williams J.

Case Link

Introduction:

This appeal concerned the correct interpretation of a statutory provision related to the discharge of greenhouse gases.

The appeal arose because Mighty River Power applied to the respondent for resource consent to commission its unused facilities as a coal-fired power station. The application did not involve the use of renewable energy. It said therefore, that the use of the coal-fired power station would not enable a reduction in greenhouse gas emissions and accordingly, based on s 104E, its application involved no scope for consideration of the effects of the discharge of greenhouse gases and the section was inapplicable. The appellant contended that the exception in s 104E applied to all resource consent applications relating to the discharge of harmful substances into the environment regardless of whether such applications were made in respect of renewable or non-renewable energy projects and it could not be restricted it to applications for renewable energy projects.

Legal Framework:

Resource Management Act 1991 (s 104E)

Climate Change Response Act 2002 s 4(1)

Dixon-McIver v Director-General of Social Welfare HC WN March 2000

Held:

The court interpreted the regulatory framework and emphasized that resource consent applications for discharge permits involving the discharge into air of greenhouse gases were more likely to be granted if they involved the use of renewable energy which would enable a reduction of greenhouse gases because the consent authority was able to consider the benefits to be derived from the use of renewable energy. However, the fact that a discharge permit application which otherwise qualified under s 104E included no proposal for the use of renewable energy did not exempt it from being considered under s 104E. That was a discretionary factor for the consent authority to take into account in deciding whether to grant consent and to have regard to the effects of the discharge of greenhouse gases on climate change. Section 104E therefore made it more likely that resource consent would be granted if they included a proposal for the use of renewable energy than if they did not. The appeal was allowed.

NEW ZEALAND 4

The Queen v. William Victor George Conway, Cash for Scrap Ltd, Millennium Investments Ltd CA234/04

Court of Appeal of New Zealand Justice(s): Heath J

Case Link

Introduction:

This case dealt with the question of appropriate sentences for criminal offences leading to environmental damage. A company called "Cash for Scrap" and its manager carried out business storing and disposing of demolition materials. Motor vehicles were accepted onto the company property for wrecking and recycling without the necessary resource consent.

The business was operated in a manner harmful to the environment. Cars had their oil filters and fuel tanks punctured and substantial amounts of chemicals and minerals soaked into the ground. The property was close to a creek which discharged into a river, and the ground water in the area below the premises was affected. The manager was charged with offences under the Resource Management Act 1991 and sentenced to three months imprisonment. He appealed against the sentence on grounds of manifest excess and pleaded for a sentence to community work rather than imprisonment.

Legal Framework:

Resource Management Act 1991

Held:

The court emphasized that the areas in question had been identified as sensitive areas due to their importance for large numbers of mainly endemic wading birds, including some threatened species. The release of contaminants had the potential to threaten the lives of insects, birds and fish.

It was of the view that the lower court had been right to choose the sentencing option that best met the goals of accountability for harm done to the community, denunciation and deterrence. There was a world of difference, in the minds of most members of the community, between a sentence of imprisonment and a sentence of community work. If a sentence of imprisonment were not imposed potential offenders might well regard the economic risk of a fine, or the possible sanction of community work, as a risk worth taking to gain profit from illegal activities. The appeal was dismissed.

NEW ZEALAND 5

Squid Fishery Management Company Limited Appellant, and Minister of Fisheries, First Respondent, and Chief Executive of Ministry of Fisheries, Second Respondent CA39/04
Court of Appeal of New Zealand Wellington Justice(s): Hammond; William Young; O'Regan

Case Link

Introduction:

This case concerned fishing related mortality of the New Zealand sea lion associated with squid fishing activity. The sea lions were susceptible to being caught up in trawl nets as they feed on squid. The Ministry had imposed operational restrictions on the squid fishery intended to limit sea lion deaths. This had involved the fixing of an annual "maximum allowable limit on fishing-related mortality" (MALFiRM). The appellants challenged the Minister's determination of the maximum allowable limit on fishing-related mortality for sea lions in the squid fishery.

Legal Framework:

Held:

The court emphasized that the Minister was required to balance utilization objectives and conservation values. This required utilization to the extent that it was sustainable. The Minister had adopted a "precautionary approach", meaning that he largely resolved uncertainties against utilization and in favour of conservation. The court, however, was not aware of a simple method by which risk on the one hand could be balanced against utilization advantages on the other. Therefore a precautionary approach to the required balancing exercise was open to the Minister.

However, the court was of the view that the approach the Minister took did not address the extent to which utilization of the squid resource conflicted with conservation of the sea lion population. In this respect, his approach was not consistent with the requirements of the legislation which authorized only measures which he considered "necessary" for avoiding, remedying or mitigating fishing effects on the sea lion population. Besides that, in fixing the MALFiRM the Minister had not taken into account the principle that decisions should be based on the best available evidence. Thus the court allowed the appeal and set-aside the Ministers' plan.

NEW ZEALAND 6

Port Gore Marine Farms v Marlborough District Council No. [2012] NZEnvC 72
The Environment Court Justice: Jackson, R.

Case Link

Introduction:

The question raised by these proceedings under the Resource Management Act 1991 ("the RMA") is if the resource consents for three high-yielding mussel farms in Port Gore should be renewed or not. The three sites are close to the southeastern shores of Port Gore on the southern side of Cook Strait. Under section 6(a) of the RMA the Environmental court must first recognize and then protect the coastal environment of Port Gore from inappropriate use and development.

Legal Framework:

Resource Management Act 1991 ("the RMA")

Held

Before it can decide whether any one or more of the proposed farms is inappropriate development The Court had to first identify how natural that coastal environment is. There have been some decisions of the Environment Court about the meaning of "natural character" in section 6(a) of the RMA but they probably now need to be read in the light of the NZCPS 2010 objective 2 which is (relevantly) "To preserve the natural character of the coastal environment and protect natural features and landscape values through recognizing the characteristics and qualities that contribute to natural character, natural features and landscape values and their location and distribution ...". In the end, after weighing all the evidence in respect of each mussel farm individually in the light of the relevant policy directions in the various statutory instruments and the RMA itself, the Court considered that achieving the purpose of the Act requires that each application for a mussel farm should be declined.

ECJ 1

European Commission v French Republic Case C383/09

European Court of Justice Luxembourg

Justice(s): (Bonichot, J.C.; E. Jaraiūnas, E.; Schiemann, K.; Bay Larsen, L.; Prechal, A.)

Case Link

Introduction:

The Habitats Directive requires Member States to ensure strict protection of that species in order to enable effective avoidance of deterioration or destruction of breeding sites and resting places. The Commission has brought an action before the Court of Justice because it is of the opinion that, by failing to institute a programme of measures ensuring strict protection of the European Hamster, France has failed to fulfil all its obligations under the Habitats Directive1, the objective of which is to promote maintenance of biodiversity.

The Commission complains that, in 2008, France failed to take adequate measures to ensure strict protection of the European Hamster in Alsace (France), the only region where it is present, which is threatened with complete extinction in the short term by harmful agricultural practices and development of urbanization, which disturb the breeding sites and resting places.

Legal Framework:

Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora 1992 (The Habitats Directive) article 1, 2, 12

Berne Convention on the Conservation of European Wildlife and Natural Habitats 1979

Case C183/05 Commission v Ireland [2007] ECR I 137, paragraph 29, 30

Case C518/04 Commission v Greece, paragraph 16 and C531/06 Commission v Italy [2009] ECR I 4103, paragraph 98

Held:

The Court points out that the Habitats Directive requires Member States to adopt measures to institute a system of strict protection of animal species 'of Community interest, including the European Hamster. Such a system must therefore enable the effective avoidance of deterioration or destruction of breeding sites or resting places of the animal species covered by the Directive.

The court declared that, by failing to establish a programme of measures to ensure strict protection of the European hamster (Cricetus cricetus), the French Republic has failed to fulfil its obligations under Article 12(1)(d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2006/105/EC of 20 November 2006

ECJ 2

Mebrom NV v Commission of the European Communities C-373/07 P
European Court of Justice Luxembourg

Justice(s): (Makarczyk., J.; Bonichot (Rapporteur, J.C.; Schiemann, K.)

Case Link

Introduction:

Where the Commission had changed the system of import quotas for methyl bromide, a pesticide which depleted the ozone layer, providing that fumigators, rather than importers, should request authorization to import or produce methyl bromide, before requesting importers to import the amount of methyl bromide granted under the Licence, the new system constituted a lawful application of Council and European Parliament Regulation (EC) 2037-2000 (on substances that deplete the ozone layer). The regulation did not oblige the Commission to grant a quota directly to the applicant, an importer of methyl bromide. The new system did not constitute a restriction on the freedom to trade, since the applicant was not obliged to cease trading. Even if the new system were to be regarded as a restriction, the general interest pursued by the Community was the protection of the ozone layer and any restriction there might be was justified by the fact that it was imposed in application of the regulation, with which it was consistent.

By its appeal, Mebrom NV asks the Court to set aside the judgment of the Court of First Instance of the European Communities of 22 May 2007 in Case T-216/05 Mebrom v Commission [2007] ECR II-1507, by which the Court of First Instance dismissed as unfounded its action seeking annulment of the decision of the Commission of the European Communities of 11 April 2005 refusing to allocate it an import quota for methyl bromide for 2005.

Legal Framework:

Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer articles.

The Convention for the protection of the ozone layer, concluded in Vienna on 22 March 1985

The Protocol on substances that deplete the ozone layer, adopted in Montreal on 16 September 1987 ('the Montreal Protocol').

Held:

The court dismissed the appeal against a judgment of the Court of First Instance's judgment upholding the decision of the Commission of the European Communities to change the system for the allocation of import quotas in respect of methyl bromide where, inter alia, it found that the decision had not breached the principle of the protection of legitimate expectation.

ECJ 3

Stichting Natuur en Milieu & Pesticide Action Network Europe v European Commission Case T 338/08

European Court of Justice Luxembourg Seventh Chamber

Justice(s): Wiszniewska-Biaecka łecka (Rapporteur), I.; Prek, M.; Dittrich, A

Case Link

Introduction:

In the present case the Court effectively expanded the scope of a relatively new legal instrument, the "Request for Internal Review (RIR)" procedure. The RIR enables NGOs to demand reconsideration of certain environmental decisions taken by the EU Institutions. It was introduced by the Aarhus Regulation (EC) No 1367/2006, which implements the Aarhus Convention into EU law. Despite inherent limitations - RIR "appeals" are made to the same body that made the original decision under appeal the RIR is an important legal instrument. It offers a "foot in the door" towards judicial review for stakeholders who have previously had very limited access to any such review.

The Case involved the European Commission's (the "Commission") 2008 decision to refuse an NGO's RIR request. The Commission defended its decision by pointing to the text of the Aarhus Regulation, which limits acts subject to an RIR to those of "individual" scope. The NGOs countered this argument stating that the Aarhus Convention itself contained no such limitation; therefore, that provision of the Aarhus Regulation was out of line with the Convention and illegal.

Legal Framework:

Convention on Access to Information, Public participation in Decision-making and Access to Justice in Environmental matters 1998 (Aarhus Convention)

Environment–Regulation (EC) No 1367/2006

Held:

The General Court essentially agreed with the NGOs and annulled the Commission's decision. This ruling affirms the priority of the EU's commitments under international law, i.e., the Aarhus Convention, over its implementation of those commitments under secondary EU law, i.e., the Aarhus Regulation. This is an important point; European environmental decision-making procedures are often characterized by an absence of transparency, meaningful public participation and accountability. Yet, the Aarhus Convention requires the opposite, i.e., procedures that provide broad access for all stakeholders, including industry, to public participation, information and judicial review in environmental matters.

ECJ 4

Interseroh Scrap and Metal Trading GmbH v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM) C-1/11 [2012] ECR
European Court of Justice Fourth Chamber

Justices J.C. Bonichot, President of the Chamber, A Prechal, K. Schiemann (Rapporteur), L. Bay Larsen and C.Toader

Case Link

Introduction:

The case was brought to a German court by a steel and metal scrap dealer claiming that an obligation to reveal the names of its waste suppliers to the consignee of the waste infringed its right to the protection of business secrets, impeded its economic activity and in effect caused a loss of clients. On 29 March 2012, the Court of Justice of the EU issued a preliminary ruling in case C-1/11 regarding requirements for shipment of waste set forth in Regulation (EC) No 1013/2006 of 14 June 2006 as amended by Commission Regulation (EC) No 308/2009 of 15 April 2009.

The ECJ was asked to interpret article 18 of the Regulation to answer whether such obligation is not qualified by confidentiality requirements under EU and national law, as well as EU primary law in order to protect business secrets.

Legal Framework:

Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste Article 18

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989 (Basel Convention) Article 1(1)(a),Annex IX Code B 1010

Held:

While the Court recognized the protection of trade secrets under Germany's basic law and general principles of EU law, it emphasized the non-derogatory character of Regulation No 1013/2006. As a consequence of the tracking procedure provided for in article 18, even when non-disclosure might be necessary to protect the business interest of the intermediary dealer, shipment documents including the waste producer's name must be available to both the authorities of the countries of dispatch and destination, and all the natural or legal persons involved in the shipment of waste.

ECJ 5

Air Transport Association of America and Others v Secretary of State for Energy and Climate Change C-366/10
European Court of Justice Luxembourg

Justice(s): Jaraiūnas., E.; Skouris, V.; Tizzano, A.; Cunha Rodrigues, J.N.; Lenaerts, K.; Bonichot, J.-C.; Prechal, A.; Rosas, A.; Silva de Lapuerta, R.; Levits, E.; Ó Caoimh, A.; Bay Larsen,, L.; Toader (Rapporteur), C.

Case Link

Introduction:

The trade body for US airlines and a number of US airlines challenged the validity of Directive 2008/101 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the EU (OJ L8/3). The applicants argued that the inclusion of international aviation in the Emissions Trading

Scheme was contrary to international law and to the Chicago Convention on International Civil Aviation, the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the 2007 Air Transport Agreement between the European Community and the USA ('the Open Skies Agreement'). The judgment of the Court concerns, first, the circumstances in which principles of customary international law and provisions of international treaties may be relied upon in the context of a reference for a preliminary ruling on the validity of a measure and, secondly, the validity, in the light of international treaty law and customary international law, of Directive 2008/101.

As a result of its analysis of the first point, the Court (Grand Chamber) did not consider the claimants' arguments under the Chicago Convention or the Kyoto Protocol. It considered that the EU, as such, is not bound by the Chicago Convention since it is not a party to it, and that article 2(2) of the Kyoto Protocol, which requires the parties to pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation, working through the International Civil Aviation Organization, is neither unconditional nor sufficiently precise to confer on individuals the right to rely on it when contesting the validity of the Directive.

Legal Framework:

Convention on International Civil Aviation 1994

Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997

Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community.

Held:

The Court, therefore, examined the validity of the Directive only in the light of certain provisions of the Open Skies Agreement and three principles of customary international law, concluding:

a) The Directive does not breach the relevant provisions of the Open Skies Agreement, in as much as:

(i) The 'Application of Laws' provision in the Open Skies Agreement does not preclude the application of the allowance trading scheme set up by the Directive when the airline arrives or departs from the territory of a Member State;

(ii) These environmental measures are not invalid on the basis that they are uniformly applied in a non-discriminatory manner to airline operators established both in the EU and in non-EU countries;

(iii) The Directive does not involve a form of obligatory levy in favour of the public authorities that might be regarded as constituting a customs duty, tax, fee or charge on fuel held or consumed by aircraft operators.

b) The Directive does not breach customary international law principles of sovereignty of States over their air space, of freedom to fly over the high seas and the principle that no State can claim sovereignty over the high seas. In particular:

(i) The scheme is, de facto, applicable only to aircraft that are physically in the territory of one of the Member States of the EU as they arrive at or depart from an airport situated in the EU, and therefore does not infringe any of those principles;

(ii) As for the fact that the Directive considers segments flown outside the EU's air space when calculating the emissions allowances, the Court points out that EU policy on the environment seeks to achieve a high level of protection.

Consequently, the EU can choose to permit a commercial activity to be carried out in its territory on condition that operators comply with criteria established by EU law. Furthermore, the fact that certain matters contributing to the pollution of the air, sea or land territory originate in an event which occurs partially outside the EU territory does not call into question the full applicability of EU law in that territory.

ECJ 6

Commune de Mesquer v.Total France SA,Total International Ltd Case C-188/07 European Court of Justice Luxembourg

Justice(s):Kokott, J.; Timmermans, C.W.A; Rosas, A.; Lenaerts, K; Bay Larsen, L.; Silva de Lapuerta, R.; Schiemann, K.; Kuris, P.; Levits, E.; Caoimh, A. Ó; Lindh, P.; Bonichot, J.-C.; von Danwitz, T.; Toader, C.

Case Link

Introduction

The ECJ gave a preliminary ruling in the case between the French municipality of Mesquer and two Total oil companies concerning compensation for the damage caused by the oil spread on the territory of that municipality following the sinking of the oil tanker Erika.

Legal Framework

Polluter Pays Principle Rio (1992)

Directive 75/442/EEC

Held

The Court ruled that oil washed up on the shore following the accident classifies as waste under Directive 75/442/EEC on waste. The Court found that in principle, in accordance with the 'polluter pays' principle, Total as the producer of the oil, based on its conduct to fail to prevent the oil spill, could also be held responsible and be ordered to finance the clearing up.

ICJ 1

Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)

Request for the indication of new provisional measures

Summary of the Order of 22 November 2013 (President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge adhoc Dugard

Case Link

Introduction:

On 18 November 2010, the Government of Costa Rica filed in the Registry of the Court an Application instituting proceedings against the Government of Nicaragua for "the incursion into, occupation of and use by Nicaragua's army of Costa Rican territory", as well as for "serious damage inflicted to its protected rainforests and wetlands", "damage intended [by Nicaragua] to the Colorado River" and "the dredging and canalization activities being carried out by Nicaragua on the San Juan River". According to Costa Rica, these activities were connected to the construction of a canal (referred to in Spanish as caño) across Costa Rican territory from the San Juan River to Laguna los Portillos. Having been given orders by the court to stop the project until the determination of the matter order of 8th March 2011 Nicaragua went on to build two new caños.

Legal framework:

Ramsar Convention.

Held/Orders:

Nicaragua shall refrain from any dredging and other activities in the disputed territory, and shall, in particular, refrain from work of any kind on the two new caños.

Nicaragua shall fill the trench on the beach north of the eastern caño within two weeks from the date of the Order

Nicaragua shall cause the removal from the disputed territory of any personnel, whether civilian, police or security; and prevent any such personnel from entering the disputed territory;

Costa Rica may take appropriate measures related to the two new caños, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory; in taking these measures, Costa Rica shall avoid any adverse effects on the San Juan River.

ICJ 2

Whaling in The Antarctic (Australia v. Japan: New Zealand Intervening)
President Tomka; Vice- President Sepúlveda -Amor; Judges Keith, Skotnikov, Cançado Trindade, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judge adhoc Charlesworth; Judges Owada, Abraham, Bennouna, Yusuf;

Case Link

Introduction:

On 31 May 2010, Australia filed in the Registry of the Court an Application instituting proceedings against Japan in respect of a dispute concerning "Japan's continued pursuit of a large scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA II'), in breach of obligations assumed by Japan under the 1946 International Convention for the Regulation of Whaling, as well as its other international obligations for the preservation of marine mammals and the marine environment". On 20th November 2012, New Zealand, pursuant to Article63, paragraph 2, of the ICJ Statute, filed in the Registry of the Court a Declaration of Intervention in the case.

Legal Framework:

1946 International Convention for the Regulation of Whaling (ICRW) Article VIII paragraph (1, 7b, 10e, 10d, 30), Article V paragraph (1 & 2)

Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998

Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012 (II)

Held:

That the special permits granted by Japan in connection with JARPA II do not fall within the provisions of Article VIII, paragraph 1, of the International Convention for the Regulation of Whaling.

That Japan, by granting special permits to kill, take and treat fin, humpback, Antarctic minke and Southern Ocean Sanctuary whales in pursuance of JARPA II, has not acted in conformity with its obligations under paragraph 7(b) and 10 (e) of the Schedule to the ICRW.

That Japan shall revoke any extant authorization, permit or license granted in relation to JARPA

II, and refrain from granting any further permits in pursuance of that programme.

ITA 1

United States Import Prohibition of Certain Shrimp and Shrimp Products; United States, Appellant v. India, Malaysia, Pakistan, Thailand, Appellees AB-1998-4
12 October 1998 WTO Appellate Body Justice(s): Feliciano; Bacchus; Lacarte-Muró

Case Link

Introduction:

The USA Government banned the import of shrimp and shrimp products from countries that did not comply with harvesting methods that did not adversely affect sea turtles. The above methods were basically limited to shrimp harvested by commercial trawl vessels using "turtle excluder devices" (TED) similar to those authorized in the USA, and also artisan harvesting of shrimp. A WTO Panel was established at the request of the plaintiff countries, which argued the illegitimacy of the announced import ban. The plaintiffs argued that the said ban was inconsistent with GATT's Article XI (General Elimination on Quantitative Restrictions), the most-favored nation clause established in GATT Article I:1, and the prohibition on discriminatory administration of quantitative restrictions of GATT Article XIII:1. The USA argued that the measures were justified under GATT, particularly in concerning the conservation of exhaustible natural resources (Article XX (g)). In fact, all seven kinds of sea turtles had been defined as endangered species in CITES. According to the USA, sea turtles were shared global resources that deserved protective measures that escaped the USA national jurisdiction.

Legal Framework:

GATT's Article I,XIII,XI (General Elimination on Quantitative Restrictions)

Held:

The Panel held that although the WTO Agreement confirmed had an environmental concern, economic development through trade was its core focus. The Panel stated that the plaintiff countries were subject to unjustifiable discrimination, after considering that global challenges, such as the protection of a shared natural resource, demanded a multilateral response. Hence the defendant had to enter into corresponding international negotiations

ITA 2

Consultative Opinion on the Compatibility between Certain Provisions of the Convention on Biological Diversity and the Agreement on Trade Related Aspects of Intellectual Property Rights as to the Protection of Traditional Knowledge EAS - OC 8/2003

Sebastian Justice(s): Bothe; Cronembold; Costopoulos; Shelton; Waite

Case Link

Introduction:

The basic issues analyzed in this consultative opinion were:

- Are there situations where the Convention on Biological Diversity (CBD) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) impose contradicting obligations upon the parties to them?
- To the extent that this is the case, how has this conflict to be solved?

Legal Framework:

Convention on Biological Diversity (CBD)

Trade Related Aspects of Intellectual Property Rights (TRIPS)

Held:

The court interpreted the scope and meaning of the obligations imposed by the CBD and the TRIPs, examined possibilities of incompatibility including questions of coexistence of the two regimes and potential conflicts on the level of implementation. Finally it addressed the question of synergies between CBD and TRIPs.

It concluded that the CBD and the TRIPs Agreement served different purposes. Thus there was no inherent contradiction between them. Nothing in Art. 27 (3)(b) of the TRIPs Agreement, relating to patentability, required any party to that agreement to violate any obligation resulting from Art. 8(j) or any other provision of the CBD. However, an effort had to be made that national patent laws and other laws relating to intellectual property were designed and applied in a way which took duly into account the objectives of CBD, in particular the principle of equitable benefit sharing.

ITA 3

The Volga case (Russian Federation v. Australia) List of cases: No. 11 International Tribunal for the Law of the Sea Hamburg Justice(s):Rao Chandrasekhara; Nelson; Caminos; Rangel Marotta; Yankov; Yamamoto; Kolodkin; Park; Engo Bamela; Mensah; Akl; Anderson; Vukas; Wolfrum; Treves; Marsit; Eiriksson; Ndiaye; Jesus; Cot; Shearer; Ballah

Case Link

Introduction:

The Volga was a long-line fishing vessel flying the flag of the Russian Federation. Its owner was Olbers Co. Limited, a company incorporated in Russia. On 7 February 2002, the Volga was boarded by Australian military personnel from an Australian military helicopter. The Respondent stated that calculations indicated that the Volga was in the Australian EEZ when spotted by the Australian military. After being apprehended, the Volga was escorted to the Western Australian port of Fremantle. The Master and crew of the Volga were detained.

On 6 March 2002, the three crew members were charged in the Court of Petty Sessions of Western Australia with the offence of using a foreign fishing boat for commercial fishing without there being in force a foreign fishing license authorizing the use of the said boat at that place, contrary to section 100(2) of the Fisheries Management Act 1991. A bail was set by the court. As part of the security for obtaining the release of the Volga and its crew, payment by the owner of one million Australian dollars was required.

The Applicant field an application with the International Tribunal for the Law of the Sea and sought a declaration that the Respondent had contravened article 73(2) of the United Nations Convention on the Law of the Sea (UNCLOS) in that the conditions set by the Respondent for the release of the Volga and three of its officers were not permitted under article 73(2) or were not reasonable in terms of article 73(2). Apart from that, the Applicant sought an order that the Respondent release the Volga and the officers and its crew if a bond or security was provided by the owner of the vessel in an amount not exceeding AU$ 500,000 or in such other amount as the Tribunal in all the circumstances considers reasonable. Australia requested the Tribunal to reject the application made by the Applicant.

Legal Framework:

Fisheries Management Act 1991

Article 73(2) of the United Nations Convention on the Law of the Sea (UNCLOS)

Held:

The Tribunal analyzed the question of non-compliance with article 73, paragraph 2, of the Convention. Referring to another judgment, the Tribunal considered that a number of factors were relevant in an assessment of the reasonableness of bonds or other financial security. They included the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form.

The object of article 292 of the Convention was to reconcile the interest of the flag State to have its vessel and its crew released promptly with the interest of the detaining State to secure appearance in its court of the Master and the payment of penalties.

According to the Respondent, the purpose of the payment by the owner of one million Australian dollars was to ensure that the ship did not "enter Australian territorial waters other than with permission or for the purpose of innocent passage prior to the conclusion of the forfeiture proceedings"; and further to ensure that the vessel “would not be used to commit further criminal offences”.

The Tribunal examined whether such a “good behavior bond” was a bond or security within the meaning of these terms in articles 73, paragraph 2, and 292 of the Convention.

The Tribunal noted that article 73, paragraph 2, of the Convention envisaged enforcement measures in respect of violations of the coastal State’s laws and regulations alleged to have been committed. In the view of the Tribunal, a “good behavior bond” to prevent future violations of the laws of a coastal State could not be considered as a bond or security within the meaning of article 73, paragraph 2, of the Convention read in conjunction with article 292 of the Convention.

Therefore, the Tribunal considered that the bond as sought by Australia was not reasonable within the meaning of article 292 of the Convention.

The Tribunal found that the Application was well-founded and that, consequently, Australia had to release promptly the Volga upon the posting of a bond or other financial security to be determined by the Tribunal.

ITA 4

Regulation of Fishing Methods and Gear EAS-O.C. - 10/00
International Court of Environmental Arbitration and Conciliation San Sebastian
Justice(s): Shelton; Raum; Caeiro; Costopoulos; Waite; Postiglione

Case Link

Introduction:

This consultative opinion dealt with alleged incompatibility of certain European Community fishing policy with international and Community environmental law concerning the conservation of marine living resources.

The petitioners asked specifically for an opinion on the need for a fishing reserve in the area of the Bay of Biscay, to restrict fishing to those vessels using traditional methods, barring driftnets, trawling and other non-selective means of fishing. Driftnet and open trawling methods had a significant negative impact on several species of fish, and fish catch had been decreasing drastically among the traditional fishing fleets.

Legal Framework:

Community fishing policy

Held:

The court analyzed international treaties, general rules and principles of international environmental law, and relevant Community law and came to the conclusion that the Community fishing policy with its ban on driftnet fishing and new control measures would provide the framework for conformity to and compliance with international law. The Community and each member state had to ensure effective implementation of the Community measures and application of general international law prohibiting non-selective methods of taking living resources.

While the establishment and enforcement of a fishing reserve in the Bay of Biscay, restricted to traditional fishing methods, was one means available to eliminate non-selective fishing in the region, it was not the only measure that could be taken to reduce unsustainable fishing practices. The choice among various methods to give effect to the obligation of in situ conservation was not dictated by international law and remained for determination by the Community and the member states in accordance with their respective powers, provided the measures complied with and were effective to satisfy international obligations.

ITA 5

Sonora case EAS 1/99

International Court of Environmental Arbitration and Conciliation San Sebastian

Justice(s): Mateo; Rehbinder; Pigretti; Sancy; Zeledon

Case Law

Introduction

This was a request for a consultative opinion as to whether or not the waste and dangerous substances deposited by a Mexican company in Tijuana and transferred to a deposit in Sonora had to be returned to their country of origin, namely the United States of America.

There were concerns about the international conveyance of dangerous waste and the tendency to turn large areas of certain "destination" countries into "poisonous international dumping grounds".

Around 30,000 cubic metres of lead contaminated waste, most of which by far had been illegally imported from the United States, had been left in a Ranch in Tijuana. Later on, the said waste was transferred upon the initiative of the Mexican Government to the CYTRAR deposit located in the town of Hermosillo, Sonora.

Legal Framework:

1989 Basel Convention

Comprehensive Environmental Response, Compensation and Liability Act of 1980, USA

Held:

The court examined the failure to apply the Basel Convention in the case, the emerging creation of international liability for environmental damage, the existence of contractual liability, the obligation of the United States to apply its own legislation and problems regarding the jurisdiction of the dispute.

It concluded that the claim for international liability of the States involved on the basis of the 1989 Basel Convention regarding cross-border movements of dangerous waste was closed, and therefore in order to obtain liability it was necessary to abandon the traditional means of repair used in international law as they had proved to be insufficient.

There was international liability of both States on the basis of the breach of the principles of environmental co-operation and prevention of cross-border environmental damage, which would be a legal basis in support of an international claim against such acts. Suitable prevention and protective measures regarding the environment required that the range of the liability mechanisms applicable in this field be extended, acknowledging that States could be held liable for actions performed by private individuals acting under their jurisdiction and control on the basis that they were answering for their own acts regarding the breach of an international obligation to ensure surveillance and protection. As far as the practice of States was concerned, claims for international liability were between States and the difficulties persisted with regard the legal questions of suitable penalties.

In relation to the case in question, the court recommended a solution that allowed full repair of the damage through the American Superfund. It emphasized the possibility of applying the C.E.R.C.L.A. (Comprehensive Environmental Response, Compensation and Liability Act of 1980, USA) on a backdated and objective basis thereby achieving almost immediate full repair of the contamination.

Finally, the conduct of the State of Mexico in relation to the CYTRAR dangerous waste dumping ground had given rise to environmental damage that was putting the health and life of the people around at serious risk. It was possible to demand that the State repair the damage caused to the environment, including the specific obligation to return the dangerous waste to its place of origin. The U.S.A. would have to finance this operation.

ITA 6

Consultative Opinion on Liability of Public and Private Actors for Genetic Contamination of Non-GM Crops EAS OC 13/04
International Court of Environmental Arbitration and Conciliation San Sebastian
Justice(s):Rehbinder; Grandbois; Odidi Okidi; Leme Machado; Morishima

Case Link

Introduction:

The basic question in this consultative opinion was: In case of Genetically Modified Organism (GMO) contamination in non-GMOs crops, especially in absence of national legislation, who is responsible to pay the damage among all the different public and private actors involved in the GMO chain of production, distribution and dissemination?

The applicant stated that he was concerned about the spreading of genetically modified organisms into traditional crops, especially without prior informed consent by the farming community. The applicant clarified that his interest concerned in particular:

a) Brazil and Pakistan, where cases of smuggling of GM seeds had occurred despite a national moratorium on GMOs;

b) The regime of liability in case of GM contamination in a certain country proceeding from Food Aid agencies.

Legal Framework:

Biosafety Protocol article 11

Held:

The court analyzed the problem of coexistence between conventional farming and GM farming, outlined basic issues of liability for GMO's international and supranational liability regimes, examined the inadequacy of traditional liability in tort or under the law of neighbor relations as well as the new generation of GMO liability laws relating to coexistence and finally analyzed the responsibility of food aid agencies for GM contamination.

It concluded that the analysis of the various liability regimes clearly showed the inadequacy of traditional tort and neighborhood liability in tackling the complex liability issues raised by genetic contamination.

The new generation of liability laws in the field of biotechnology, including genetic contamination, normally provided for strict liability and thereby removed the obstacles of fault and negligence or balancing requirements. Liability normally was civil in nature. However, there were also examples of administrative liability, especially with respect to the beneficiary of compensation and the determination of damage. Then, pure ecological damage or socio-economic damage could be covered.

Under public international law, states and international organisations were in principle responsible for their food aid agencies when the latter had breached a rule of public international law and caused damage to the recipient state. However, it was highly doubtful whether the mere omission to inform the recipient state about the GM properties of food supplied would lead to responsibility. International law was quite reluctant to recognise preventive information obligations and the necessary threshold of harm may not be surpassed.

The violation of the advance information obligation for GM food set forth in article 11 Biosafety Protocol by a contracting party may course give rise to responsibility under public international law if the threshold of damage was surpassed. Besides, the violation of national rules regarding the import of GM food adopted by a contracting party in implementing the protocol in national law may render the importer liable for damages under national tort law.

ITA 7

Protection of the Meridian Frog (Hyla Meridionalis) EAS CC 9/2000
International Court of Environmental Arbitration and Conciliation San Sebastian
Justice(s): Madar; Mestre; Pirro; Posse; Pita

Case Link

Introduction:

The Meridian Frog (Hyla Meridionalis) was considered to be the only amphibian endangered of extinction of the Basque Country according to the Basque Catalogue of Endangered Wild Fauna and Flora. Hyla Meridionalis was listed in appendix II of the Convention of the Conservation of European Wildlife and Natural Habitats as a strictly protected fauna species. Reproduction of Hyla Meriodionalis was effective only in the area of Gurelesa dam, where 85% of adults were concentrated. The lands of Gurelesa dam were sold to a company intending to refill the dam and construct an industrial pavilion as a part of a business area.

The Conservationist Association Haritzalde formally requested the declaration of Gurelesa dam as a protected habitat, but until the date of presentation of the petition to the International Court of Environmental Arbitration and Conciliation it did not receive any formal answer.

Legal Framework:

Order 167/1996 Basque Catalogue of Endangered Species of Wild Fauna and Flora

The Act 16/1994 on Nature Conservation of the Basque Country

The Convention on the Conservation of European Wildlife and Natural Habitats

The Convention on Biological Diversity

Held:

In order to reach its consultative opinion, the court interpreted the relevant Spanish national legislation as well as international conventions. It concluded that the petition of the conservationist association could be considered as justified. The intended construction of a business park in the natural habitat of Hyla Meridionalis would violate legal provisions aimed at the protection of this strictly protected species including the Order 167/1996 Basque Catalogue of Endangered Species of Wild Fauna and Flora, the Act 16/1994 on Nature Conservation of the Basque Country, the Convention on the Conservation of European Wildlife and Natural Habitats and the Convention on Biological Diversity.

The conservationist association could request that the competent authorities change the land use plan of the relevant area and declare the natural habitat of Hyla Meridionalis a protected area. The association could also prepare, in due co-operation with competent authorities, a status report including appropriate and necessary legislative and administrative measures to ensure the conservation of the habitat.

ECHR 1

Dubetska and Others v. Ukraine (Application no. 30499/03)
Fifth Section (In a Chamber) Justice(s): Peer Lorenzen, Karel Jungwiert, Mark Villiger, Mirjana Lazarova Trajkovska, Zdravka Kalaydjieva, Ganna Yudkivska Angelika Nußberger.

Case Link

Introduction:

The applicants in this case before the European Court of Human Rights (ECtHR) are two Ukrainian families who had their residences in close proximity to a coal mine and a coal processing factory in the Ukraine as well as two spoil heaps created by these industrial facilities. They claimed that their right to respect for private and family life (Art. 8 ECHR) was violated on account of prolonged environmental pollution emanating from a state-owned mine and factory.

Legal Framework:

European Convention on Human Rights (ECHR) Article 8, 34

Constitution of Ukraine Article 16 & 50

Held:

The court dismissed an objection made by the Government of Ukraine that the applicants did not exhaust all domestic judicial remedies (required for the admission of a case to the ECtHR). It then found that Art. 8 was applicable, noting that it is often impossible to quantify the effects of industrial pollution in each individual case and that it is hard to distinguish the effects of environmental hazards from the influence of other relevant factors, such as age, profession or personal lifestyle. It consequently found that, through failing to relocate the applicants or put in place a functioning policy dealing with environmental risks, the Ukraine did not strike a fair balance between the interests of the individuals concerned and the society as a whole. Its actions could therefore not be justified under Art. 8(2) of the Convention. The Court awarded EUR 32.000 and EUR 33.000 in non-pecuniary damages to the families respectively on the basis of the Article 8 violation.

ECHR 2

Case of Kyrtatos v. Greece Application no. 41666/98
European Court of Human Rights Strasbourg Justice(s): Tulkens; Rozakis; Lorenzen; Vajic; Levits; Kovler; Zagrebelsky

Case Link

Introduction:

The applicants, complained, under Article 6 § 1 and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, about the failure of the authorities to comply with two decisions of the national Supreme Administrative Court annulling two permits for the construction of buildings near their property. The first applicant was the owner of a house and a plot of land on a Greek peninsula, which was adjacent to a swamp by the coast.

In 1985 the prefect in charge redrew the boundaries of the settlement for the area. Later on the town-planning authority issued building permits on the basis of the prefect's decision. The applicants lodged an application for judicial review of the prefect's decisions and of the building permits with the Supreme Administrative Court. The basic argument was that the prefect's decisions, and consequently the building permits, were illegal because in the area concerned there was a swamp and Article 24 of the Greek Constitution, which protected the environment, provided that no settlement should be built in such a place. The court found that the decision had violated Article 24 and the building permits were also unlawful and had to be quashed.

Legal Framework:

Article 6 § 1 and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms

Article 24 of the Greek Constitution

Held:

The European Court of Human Rights emphasized that the execution of a judgment given by any court had to be regarded as an integral part of the "trial" for the purposes of Article 6. Where administrative authorities failed to comply the guarantees under Article 6 were rendered devoid of purpose. It noted that the Greek authorities had refrained for more than seven years from taking the necessary measures to comply with the enforceable judicial decision in the present case. Thus they had deprived the provisions of Article 6 § 1 of the Convention of all useful effect. There had accordingly been a breach of that Article.

Apart from that, the applicants contended that urban development in the area in question had led to the destruction of their physical environment and had affected their life. They relied on Article 8 of the Convention, which provided: "1. Everyone has the right to respect for his private and family life, his home and his correspondence." They complained that urban development had destroyed the swamp which was adjacent to their property and about other environmental pollution.

With regard to the first complaint, the Court noted that severe environmental pollution could affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. Yet the crucial element for the violation of the rights in Article 8 was the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment. Neither Article 8 nor any of the other Articles of the Convention were specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation were more pertinent in dealing with this particular aspect.

In the present case, even assuming that the environment had been severely damaged by the urban development of the area, the alleged damage to the birds and other protected species living in the swamp was not of such a nature as to directly affect their own rights under Article 8 § 1 of the Convention. It could have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' house, a situation which could have affected more directly the applicants' own well-being. In conclusion, the Court could not accept that the interference with the conditions of animal life in the swamp constituted an attack on the private or family life of the applicants.

ECHR 3

Lopez Ostra v. Spain Case No. 41/1993/436/515
European Court of Human Rights Strasbourg

Justice(s): Mifsud Bonnici, G.; Ryssdal, R.; Bernhardt, R.; Spielmann, A.; Palm, E.; Morenilla, J.M.; Bigi, F.; Baka, A.B.; Lopes Rocha, M.A.

Case Link

Introduction:

The applicants were nationals and residents of Spain who complained that a waste treatment facility was sitting a few meters from their home. They claimed a violation of their right to privacy and family security guaranteed by article 8 of the European Convention.

Legal Framework:

Convention for the Protection of Human Rights and Fundamental Freedoms

Held:

The Court for the first time held that a failure by the state to control industrial pollution was a violation of Article 8 where there was a sufficiently serious interference with the applicants' enjoyment on their home and private life. However, the ECHR noted that regard has to be given to the fair balance between competing interests of individual and community as a whole (balancing the 1st and the 2nd paragraph of the Article 8). It is important to note that in some cases the economic interest of a state (which is regarded as the interest of the community as whole) can override the interest of an individual. However, where a polluting activity is actually violating an existing national law, the State's overriding economic interest in its continued illegal operation is difficult to assert. Moreover, ther is a positive duty of a state to take measures, which would secure the enjoyment of the individual rights to private life and property.
