Institutional and Functional Aspects of Control Regime

Chapter - IV
4.1 Grounds for Justice

In rhythmic course of nature and in every walk of life we want justice be done with us at every step. But this is an Utopian idea which cannot be upheld practically. But up to a limit, justice can be held as and when injustice is felt in abyss. Elizabeth Wolgast has argued that we invoke justice when our sense of injustice has been outraged in some way and sense of injustice is prior to any particular conception of justice that we articulate. A concept of justice is a response to and a more or less successful articulation of our sense of injustice. Sense of injustice is a kind of check on our actions, self-interpretations and commitments. However, it is an unstable check.¹

Sense of injustice can be corrupted by circumstances and self interests: as Jean Jacques Rousseau says, “a dash of prudence and a little philosophy enable the educated individual to silence the claims of natural sympathy and to ignore crime committed in the street below. Every society may be characterized by such corruption.”² To shun out the utopian ideas of perfect state and absolute justice, at least to dispense with the physical justice efforts could be and would be made. Here in present Chapter which deals with the functional and institutional aspects of world’s control regime i.e. International Court of Justice as well as few regional control regime whose function is to protect environment as a right of human beings and which is institutionalized with it automatically, impliedly as well as
expressly but International Court of Justice is, how far and up to what limit a successful body is very clear from nuclear tests case and its response to World Health Organisation request for advisory opinion of that particular point of legality of using nuclear weapons in armed conflict or war or both.

By the observations and with a vision upto Abyss, it comes to surface that International Court of Justice has a shallow base which is based in subterfugism or escape theory, theory which gives an idea of escapism from responsibilities by raising the questions of no importance, where court find itself surrounded by political will. It is the lack of spirit which makes the International Court of Justice handicap.

On the other hand after examining transnational cases regarding environmental law and environment pollution, it could be found that where law of two or more countries establish a unique as well as cooperative phenomenon of giving/ delivering justice, justice is always availed though in some cases, it has shown impotency to deal with right situations but overall scenario is in favour of granting justice. When law of one country is less potent in giving compensation to aggrieved party, law of other country is made applicable with the same spirit and instinct of doing justice. Examples can be quoted of Trail Smelter case and case of Walter Poro. Regarding Impotency at some instances case of Salzburg airport, Binobi and Abdul Wahid Bhopal Gas Leak Case can be quoted. Transnational bodies has shown more perfectness in combating with the violation of right to unpolluted environment which prove us that effectiveness can be
commanded in proper functioning and institutionalizing of rights if at a low scale of two or three Nations then also at a medium scale of regional concepts. As European Court of Justice has proved and is proving its worth by constructing the idea of never ending Right of environment through its functional aspects i.e. judicial decisions eg. Danish Bottle Case, Green Peace cases.

It has proved that size is immaterial. Immature is the vastness of area under jurisdiction. Material is instincts. Material is spirit to deliver justice effectively.

There is really a disappointment in concluding that what is expected from a body, which controls not only transnational or regional disputes but also disputes relating to whole world, whole humanity, is totally ineffective in delivering justice. Best examples has been quoted of Nuclear test case and World Health Organisation request for advisory opinion on legality of use of nuclear weapons in armed conflicts or war. It has shown the impotency by escaping from its responsibilities but reason behind can be quoted as wrong conception of sovereignty and lack of enforcement machinery.

However a move side by side for a critical analysis as well as praise-worthy steps can be made while discussing the functional phenomena in judicial decisions made by various regimes effectively or non-effectively.
4.2 Transfrontier verdicts

Transboundary pollution is a curse not only for the country of its conduct but also where it has the impact as by discussing few cases there will be a clear and apparent spectacle.

4.2.1 Salzburg Airport Case

Township of Freilassing and Max Aicher Vs. Federal Ministry of Transport and State owned enterprises, This appeal was directed against a decision by Federal Ministry of transport and State owned enterprises as superior civil aviation authority granting to Salzburg airport operating Co. Ltd. (Pursuant to Article 68 Para 1 of 1957 Austrian Aviation Act) a permit to expand the operating range of Salzburg airport for the purpose of extending the length of paved runway from 2200 meters to 2600 meters in accordance with the specifications, including requirements from protecting airport neighbours against undue aircraft noise.

In its reasoning the authority pointed out the need to adapt Salzburg Airport to international air traffic standards with Jet traffic in particular requiring longer runways, is in line with regional plan for European Airport Expansion issued in February 1966 by International Civil Aviation Organisation that plan recommended to Austria as an ICAO member state to extend the runway of this airport (designated as deviation airport for Vienna and Munich) to a length of at least 2500 meters by 1970, so as to enable jet aircraft to land at the airport.
Authorities also indicated that there was a ban on night flights and the objections of property owners affected by project ("especially citizens' association for protection against expansion and risk of Airport operations at Salzburg Maxglan") had been invalidated and refuted with regard to questions of aviation safety and aircraft noise by an aircraft noise expertise and an opinion from Swiss aviation experts.

So Bavarian Municipality of Freilassing and the owner of a plot of land situated in Freilassing (Bavaria) brought appeals against that decision.

Here in this case how courts can avoid their functional aspects of protecting environment can be visualized by the argument raised and accepted by court where court says according to principle of territorial administrative law exclude the standing of first appellant as it doesn't come under the Austrian territorial authorities and are not representatives of legal interests affected by project as the territory is out of Austria. Since the area of application of aviation act is limited to the territory of Republic of Austria, neither can the second appellant – as proprietor of a plot situated abroad – can claim standing in proceeding.

Furthermore there is no provision in Aviation act as interpreted by Administrative High Court which would empower the owners of a real estate adjoining an airport, even within Austria to participate in such proceedings as a party. According to decision of Court of 20 June, 1963 (Z. 1225/62 Slg. 7149/a/67) property owners are considered to be affected by a
civil airport operating permit only to the extent that airport project directly claims their land for aircraft starting or landing, be it for the aircraft proper or for an additional safety zone.

Appellants argue that decision will be of great concern to the township of Freilassing and its residents as recognized by Salzburg Airport treaty concluded on 16th June, 1967 between republic of Austria and Federal Republic of Germany. But court held as treaty is not yet ratified so Aviation act as domestic legal norm is not restricted by international legal norms. So appellants can’t be benefited from an unratified treaty. Austrian administrative high Court dismiss appeal brought by appellants (Germany township of Freilassing in Bavarian Germany and Max Aicher an engineer and German citizen and owner of residential property situated in Freilassing) against Austrian Ministry of transport and State owned Enterprises as superior civil aviation authority.

Courts decision was upheld by Austrian Constitutional Court in 1969. In 1974, Salzburg Airport treaty was ratified. Appellants brought case before their Local Courts but District Court dismissed the request for annulment of the ratification statute and refuse to grant noise pollution injunctions against operation of airport and referred appellants for compensation of damages under bilateral treaty. This judgement was reversed by Munich Court of appeals in 1976. Federal Supreme Court submitted the question of Constitutionality of treaty to Federal Constitutional Court on grounds that treaty amounted to taking of
adjourning land owners property rights and deprived them of their rights of due process. Federal Constitutional Court disagreed and held Salzburg treaty did not infringe any right of German Citizen as granted by German Constitution under Article 14.3 Federal Supreme Court then dismissed appeal on ground that plaintiffs had failed to substantiate their claims whereupon plaintiff finally withdrew the action in 1990.

Latest reports says Residents of Freilassing town triggered new protests and transport ministers of both countries made arrangement in 1995 to relax the ban on right flights for low noise aircraft under Article 2(2) of treaty.

Clear example of malfunction of functional aspect of institution of judiciary which obviously and intentionally dispensed with its institutional character by refusing to give relief to affected people from environment pollution when institution itself is not guaranteeing the feasible and vulnerable rights of mankind, what can be expected from other bodies of administration and judicial powers.

Noise is kind of pollution which can be quoted as slow poison. Owners were not considered affected because of noise pollution but because of Grabbing of their land for expansion of airport. Property was given preference to health. Liability of Court was shun by saying that treaty controlling airport administration and operation is not ratified and benefit cannot be given on basis of unratified treaty. Result held till date
are protests against such injustice. But in another case of transboundary pollution rather in première case of such pollution what international cooperation had be achieved, is miraculous as well as praiseworthy which really is compatible with the idea of peaceful settlement of disputes as enumerated in charter of United Nations though this case took place before the birth of United Nations rather it could be said that United Nations has reflections of these sort of Judicial attitudes in the Charter.

4.2.2 Trail Smelter Case

In United States Vs. Canada (Better known as Trail Smelter Case), very first case to applaud the institutional and functional aspect of international environmental control regime in shape of Arbitral tribunal. Arbitration arose from claims involving transfrontier air pollution by a smelter factory located in trail (province of British Columbia) about 20kms North of United States boundary. Factory owned by a private consolidated Mining and Smelting Co. of Canada Ltd. roasted sulphur-bearing ores and emitted sulphur-di-oxide fumes into air which between 1927 and 1937 caused damage to privately owned agricultural and forest lands near the township of NorthPort (State of Washington, U.S.A.).

On 7th August, 1928 issue was initially referred to International Joint Commission established by United States Canada Boundary Water Treaty, 1909, which submitted its report on 28th February, 1931 recommending compensation and remedial measures. After further
representation by U.S.A. in 1933, both countries concluded a compromise whereby Canada agreed to pay $3,50,000 for damages caused up to 1932 and question of subsequent liability and prevention was submitted to an Arbitral tribunal. In its first decision tribunal in 1938 evaluated damages of $ 78,000 for the period 1932-1937. In its second decision of 11\textsuperscript{th} March, 1941, tribunal denied the amount of money spent in investigation, preparation and proof of cases as these were in nature of expenses of presentation which are to be paid by each government according to arbitration convention. Secondly, it took guidance from certain US Supreme Court cases dealing with both air and water. Pollution as there was absence of international cases on the subject and when no contrary rules prevailed in international law.

Thirdly tribunal predicted that no state had right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or properties or person there in and when the case is of serious nature, injury is established by clear and convincing evidence.

Tribunal held Canada responsible for conduct of Trail Smelter in international law and required Trail Smelter to be refrained in future from causing any damage through fumes to State of Washington and avoid such damages, there should be a control regime or measure of control and in case damage occurs, indemnity to USA should be fixed in such manner as the Government acting under the convention may agreed upon.
Excellent and praiseworthy step taken at international level by the international institution to prevent environment pollution though no physical penalty had been inflicted yet measures taken by Arbitral Tribunal in inflicting financial punishment for violation of the right of neat and clean environment of the people of State of Washington is a remarkable step which could set a precedent in such sort of transboundary pollution in such a ratio so as to avoid it.

4.2.3 Rhine Salt Case

In another case of Rhine Salt, court proved the notion of liability, where ordinary diligence was needed but wasn’t adopted. Results in environment pollution and health degradation of human beings. Compensation was ordered after assuming all fact scientific as well as legal.

In Bier, Strik and Valster Gardening Companies Vs. Alsace Potash Mining Corporation\(^5\) (Mines Domaniales de Potasséd’ Alsace, MDPA), Plaintiffs had summoned the defendants to appear in District Court in Hague. Court was requested to pronounce judgement that increase of salt burden of water of Rhine by discharge of salt waste to the extent it occurs – is tortuous with respect to plaintiffs and to order defendants to pay compensation for the damages suffered and future damages to be suffered by plaintiffs as a consequence and this has to be assessed by court and to be settled under law. District Court at Hague referred the case to District
Court at Rotterdam subsequently. Both cases were joined at Court at Rotterdam.

Court order an interlocutory hearing on 8th January, 1979 and ordered an expert investigation before making any decision further. After the expert reports final judgement of 16th December, 1983 declared that discharge of waste into Rhine by MDPA (Defendants) to the extent in which such occurs – is tortuous with respect to plaintiff ordered MDPA to compensate for damages suffered by since 4th October, 1974 and future damages to be suffered by plaintiff as consequences, more specifically that part of the total damage that corresponds to the portion of salt discharged by MDPA contributes to in the salt of water used by plaintiffs as irrigation waters or of available drainage water, which share to be determined for the period from 1st January, 1975 upto 31st December, 1978 in accordance with the assessment of experts.

Defendant preferred appeal to court of appeals at Hague. Court of appeal confirmed the decision of District Court and referred the case to District Court, Rotterdam for damage assessment procedure. Again appeal was preferred to Supreme Court against the decision of Court of appeals, Supreme Court considered few stances as drainage water used by plaintiffs had already a high salt percentage through natural causes (Salt tongue and Salt seepage) the portion of total salt burden attributable to salt discharge of defendants, which reached the drainage water via river Rhine, was in comparison to this minor but not negligibly small and defendants act
contrary to duty of due negligence toward plaintiffs and Supreme Court dismissed the appeal on Merit and ordered defendant to pay cost incurred till judgement.

How Court can go up to extreme in delivering justice is visualized by Walter Poro’s case where argument raised to make a conflict of French and German laws were cleared and rejected by Court while elaborating the difference of both laws applicable in the case and giving the right to choose a law (more gainful) to aggrieved party for claiming compensation. Argument raised were diminished by Court’s sharp and accurate observations to deliver justice.

4.2.4 Walter Poro Case

In *Walter Poro Vs. Houilleres du Bassin de Lorraine (HBL, Lorraine Bassin Coal Mining Corporation)*, Plaintiff was the owner of a plot of land situated in Kleinblittersdorf (Saarland/ Germany) on which he operated a large garden restaurant, “*The Rebenhof*”. Plaintiff had also built a Motel bungalows on his land which he rent to customers. Defendant was a French public utility corporation, which pursuant to French legislation regarding state owned mining companies is endowed with distinct legal personality.

In 1952-53, defendant built and electric power plant in Grosblieederstroff (Moselle District/ France). On the French side of Saar River, opposite plaintiff property and began operating the plant in March
1954. Power plant generated energy by combustion of coal sludge and similar type of low grade coal. The combustion process involved major emissions of smoke, coal dust and soot which had impacts on neighbouring areas of Saar valley including the municipality of Kleinblittersdorf and plaintiff property. Plaintiff claimed that as a result of coal dust, his entire orchard and garden corps were destroyed, the terrace of his café - restaurant become unusable and motel unrentable, so during 1954-55 he suffered a loss of income amount to 1,521,580 francs (approximately $3,00,000) each year, for which he claimed compensation.

District Court allowed compensation. In appeal arguments were raised by defendant about jurisdiction of German Courts to decide cases as defendant was a French company but Court said defendant status as a public utility corporation under French law and as operator of power plant on behalf of French State, was no obstacle to action. When economic enterprises of foreign states operated largely autonomous entities, they were not immuned from jurisdiction of German Courts.

The place where a tort was committed, was the place where the wrongful act materialized. If the place of conduct is different from place of harm, both places are the place where the tort is committed, since a tort comprises both harm and conduct. As the conduct occurred in France and harm in Saarland, both German and French law may be applied. This kind of cases require an assessment of both laws in order to ascertain which of them would uphold the action where one law is more demanding and other
less demanding and where the plaintiff’s claim is sufficiently found under the later law, latter must be applied. If the country where conduct took place has less demanding standards for a claim of damages, there is no reason why the tort feasor should be better off whenever the harm occurred abroad.

If on the other hand, law of country where the harm occurred is less demanding injured party should not be worse off whenever a tort feasor acted abroad. Injured party therefore has a right to opt for the law that is more favourable to it. Principle of more favourable law as a rule really does not involve a choice of foreign law. But simply allows an action based on tort to be evaluated by standards both of German and French law. Under French law the claim is not limited to compensation of material damage caused by harm to property or business but in contrast to German law also covers moral damages. Plaintiff so can opt for French law as the law mere favourable to him.

Secondly place of impact and place of conduct here are different so question arises which of the two is to be considered as place where the tort was committed. French courts themselves have given the answer of this question in favour of place of conduct regardless of whether it is based on fault or on responsibility for inmate things or animals under one’s care. The linkage with place of conduct is also confirmed by majority of French legal writers like as the German Private International law which recognized the place of conduct as the place where the tort is committed.
Expert opinion gives reference of another case decided by Cour de Paris (Paris Court) on 18th October, 1955 where court apply French law even though place of conduct Le Fait generateur occurred in Portugal and only Impact occurred in France. Decision specify that occurrence of impact in France was sufficient to justify application of French Law. Moreover in that case plaintiff had requested and defendant had not contested the applicability of French law. Paris court didn’t oppose the linkage to place of conduct but rather demurred on question whether Portugal law might have appealed, had the plaintiff requested. Court in present case decided that French Law is rightfully applied by District Court as according to Article 1384(1) of French Civil Code defendant is liable for damages caused to plaintiff by operation of power plant as defendant is operator of power plant by exercising direction and control over plant and power plant is an inanimate thing.

It doesn’t matter whether defendant installed anti pollution equipment using the best available technology as Article 1384 establishes a non-rebuttable presumption of fault on side of tortfeasor. Defendant could escape liability only by proving the damage was caused by Force majeure or owing to plaintiff’s own fault or that the defendant had a right to cause damages. Under the principle established by French case law, adjoining property owners must tolerate only those interference and nuisances which are usual consequences of neighbouring relations and soot and dust emitted by power plant significantly exceed the levels which were usual in the...
vicinity prior to the establishment of power plant and District Court also notified correctly that plaintiff suffered damages as a result of operation of power plant. Impacts interfere substantially with use of plaintiff's land are considering the significant volume of smoke, soot and coal dust emitted by the power plant towards plaintiff property. Plaintiff's property was affected by such emissions during at least 60% of all days in 1954 and 1955.

Defendant was at fault also having intentionally harmed property and business of defendant. Defendants executives could have foreseen and consciously accepted, the impacts on plaintiff's property as necessary consequence of operation of power plant, which is sufficient to constitute intent. After becoming aware of fact that they don't had full equipment to control pollution, they continue with the operation of power plant and now defendant admit that improvements were feasible and are to be made in near future. Defendant also cannot claim exoneration for having taken due care in selecting the suppliers of filter equipment. This is however the face which shows respect for strict liability as defendant alone is responsible for having operated the filter equipment supplied inspite of existing defects.

In view of these circumstances and facts court of appeal allowed compensation.

But matter doesn't stop here. The problem of implementation was still there. Walter poro (plaintiff) tried unsuccessfully to execute judgement. After his death in 1963 his family accepted a settlement from
defendant corporation for about 35,000 Din (less than $20,000) and pollution control along the Saar and Moselle river become the responsibility of an intergovernmental commission established in 1961. Due to public protest from both sides of border, this coal fired power plant was demolished in 1990 and proposed programme to establish a waste incineration plant had been abandoned.

4.2.5 Bhopal Gas Leak Case

How and up to what extreme political benefits of Government can overlap the judicial process, is very apparent by case of Bino Bi and Abdul Wahid.

In Bino Bi et al. Vs. Union Carbide Chemical and Plasters Inc. et al.\textsuperscript{7} and Abdul Wahid et al. Vs. Union Carbide Chemicals,\textsuperscript{7} On night of Dec 2, 1984 when winds blew a deadly gas from a plant operated by Union Carbide India Ltd. into densely populated areas of Bhopal, India. On 2\textsuperscript{nd} Jan. 1985 judicial penal on multi district litigation assigned some 145 purported class actions filed in Federal District Courts across U.S.A. to Southern District of New York where they became the subject of Consolidated complain filed on 28\textsuperscript{th} June, 1985. On 29\textsuperscript{th} March, 1985 India enacted Bhopal Gas Leak Disaster (Processing of claim) Act which granted Government of India exclusive right to represent the victims in India or elsewhere.
Pursuant to this authority Indian Government filed complaint in New York on behalf of all victims because Indian courts had no jurisdiction over Union Carbide Corporation, UCIL Parent Company. Judge dismissed the case on ground of *forum non-conveniens* over the objection of Indian Government and individual plaintiffs. One reason among others for dismissal of case was Union Carbide’s. Consent to jurisdiction of courts of India. In September 1986 Indian Government filed suit in Bhopal District Court. Litigation continued for more than 2 years by orders dated February 14, 15, 1989. Supreme Court of India approved a settlement of all litigation, claims, rights and liabilities related to and arising out of Bhopal disaster.

Under settlement UCIL agreed to pay $470 million to Indian Government for benefit of all victims. Court agreed to settlement as it was primarily concerned with immediate relief to victims and held the constitutional validity of Bhopal Gas Act and confirmed Indian Government exclusive right to compromise all claims arising out of Bhopal Disaster.8

After this settlement 2 claims were filed in Texas State Courts in October 1990 for compensation by Abdul Wahid and Binobi as on ground that Indian Government had an unacceptable conflict of interest as part owner of UCIL and most of victim opposed settlement as inadequate and their due process right was violated as they received inadequate notice and inadequate representation in proceedings. But suits were dismissed. On 20th
January, 1991 judicial panel on multidistrict litigation transferred these two actions to Southern District of New York. Judge refused to reconsider the cases on the ground of whether plaintiffs have standing to maintain this action in Courts of his country despite the Bhopal Acts delegation to the Indian Government of exclusive right to represent those injured in Bhopal disaster.

India passed Bhopal Gas Act to secure claims of victims effectively whose Section 3 delegates to Indian Government exclusive right to represent and act on behalf of victim (within India or outside) which includes right to institute or withdraw a suit and to enter into a compromise where as Section 4 permits individual claimants limited right to participate in proceedings by permitting him on his expense, a legal practitioner of his choice to be associated thereby in proceedings.

Secondly Supreme Court of India has held Bhopal Act Constitutional and approved Indian government exclusive representation of all victims in its sovereign capacity to give victims immediate relief and if there was a lack of notice, it may affect the appearance of Justice but justice was infact done because arguments against settlement were adequately advocated and argued against it and in the whole act was passed by its democratic parliament.

Judge further held if we will pass judgement on validity of India response to a disaster occurred within its borders, it would disrupt our
relations with that country and frustrate the efforts of the international community to develop methods to deal with problems of this magnitude in future. Further, permitting individual states to develop rules to determine the Bhopal Acts effect on standing in their courts would frustrate the need for a uniform policy on matters of foreign relations. District Court Judgement of dismissal is affirmed.

Here one thing becomes clear that responsibility avoided is justice denied. Contemporary situations of developing India clearly raise the situation of corrupt political will and mal system of judicial interpretations though judiciary in India is Supreme but having a glimpse of various amendments made by Parliament by interfering in Judicial decision make it obvious, how rational the decision of Indian court was. Here in this case political will overlap the human instinct or judicial instinct. When Judge conclude that by interfering into decision of Indian Supreme Court, we are afraid of straining of our relations.

Secondly after transfrontier decision regarding environment we have to see that What is the contribution of International Court of justice and European Court of Justice to development of International Environment Law. These courts have a functional aspect of delivering justice. International Court of Justice is a principal organ of United Nations. Its function is to settle international disputes and give its advisory opinion at request of authorized agencies which is non-binding. European Court of Justice is a judicial organ of European Union which ensure that
interpretation and application of European Community treaty “The Law is observed”, question arises whether these two courts have addressed environmental issues at all and if so whether either court is willing to recognize the place of environment protection objectives in legal order within its function. Secondly whether either court has shown any propensity to give real weight to environmental objectives.  

In respect to International Court of Justice it could be said that it is yet to make a really significant contribution to development of international environmental law as it has first supply confirmed only environmental obligations which exists. Though by order of Court in 1993 there an environmental chamber was created but whether it can play any role in making International Court of Justice decisions effective to prevent environment pollution. It is rather more a political decision to prevent establishment of a separate International environmental Court regarding willingness to give environment protection a boost over other social objectives, court is unlikely to apply or develop the law in expansive manner. This all has to see in light of cases decided by this control regime as will be discuss ahead.

4.3 Contribution of European Court of Justice

In contrast, European court of justice has addressed a large range of environmental issues within European Community. It has till date decided more than 150 cases of environment protection. It has given to
environmental protection objective an equal weight over economic and trade objective by showing its willingness to recognize some of special characteristics of environmental issue. Most frequently way to approach court is via Article 169 (Now Article 225) of EC treaty European Commission has brought number of cases before Court alleging failure of member States to comply with European Community environmental obligations under Article 170 of European Community treaty.

European Court of Justice may impose lump sum or penalty payment on member state that has failed to comply with one of its judgement. Under Article 173, European Court of Justice is competent to review the legality of certain acts of European Community Council and Commission. Grounds of review are whether body acted beyond required or infringed. EEC treaty (See Annexure) or any rule relating thereto or has misused its power. It has same jurisdiction under Article 175. National Courts of member states may refer to European Court of Justice questions concerning the interpretation of European Community treaty and validity under Article 177 of European Community treaty whether European Court of Justice has demonstrated a willingness to recognize environmental objectives in full sense or not. This can be made cleared only by decisions delivered by court as explained ahead.

How a state can be held guilty for non-observance of a particular objective of a regulation is very clearly apparent and envisaged by Bolivian fur skin's case where French Government was held guilty of non-
observance of Article 1013 of European Commission regulation which was
to restrict illegal trade in fur skin of certain species considered to be
endangered by E. Community. It is the effectiveness and enforcement
policies which make a decision obeyed. European countries have shown
special regard in this respect by constituting European Court whereas in
Asia, there is nothing like such court as lack of cooperation is there.

4.3.1 Bolivian Fur Case

In Commission of European Communities Vs. French Republic,\textsuperscript{10}
Parties of 1973 Washington Convention on International trade in
endangered species of Wild Fauna and Flora (CITES) had recommended a
suspensions of Imports from Bolivia because of trade irregularities and
European Commission has interacted its member states accordingly.
CITES standing committee recommended to lift the ban in 1985 November
but European Union ban was still in effect when French authorities issued
an import permit for some 6,000 Bolivian Fur skin which were
subsequently re-exported to Germany and seized by custom at Munich
airport. By an application lodged at court registry on 25\textsuperscript{th} May, 1989 the
commission brought an action for a declaration that by issuing import
permit for more than 6,000 wild cat skins of felis geoffroyi and felis wiedii
species originating in Bolivia, French republic had failed to fulfill its
obligation under Article 10(1)b of Council regulation (EEC) No. 3626/82.\textsuperscript{11}
During the period concerned wild cats of felis geoffroyi and felis wiedii species were listed in appendix II of the convention. Appendix includes species which might become threatened with extinction unless trade in such species is subject to strict regulation in order to avoid utilization incompatible with their survival. Regulation 3626/82 was adopted in order to ensure the uniform application of measures of commercial policy which implement the provisions of convention. For certain species like wild cats skin, regulation provides for strict measures than those provided by convention. On 6th Feb. 1986 competent French authorities issued import permits for wild cat skins of species in question. These permits referred to export permit issued by Bolivian authorities on 5th August, 1985. Commission considered that export permit was issued wrongly on the ground that conditions laid down under Article 10(1)b were not satisfied.

In support of its view, commission refers to the factional context in which decisions of French authorities were adopted as in discussions of conference parties which took place in Buenos Aires between 22 April and 3rd May, 1985 contracting parties found that there was substantial illegal trade in products covered by convention originating in Bolivia and there were a large number of false exports or re-export permits. Resolution recommended that contracting parties should no longer accept shipments of specimens covered by convention accompanied by Bolivian documents or originated in Bolivia until Bolivian Government demonstrated to
Convention about adoption of all the measures within its power property to apply the convention and import permit no longer be issued to Bolivian government for specimens concerned. According to commission when import permits concerned were issued in February 1986, French authorities did not consider that conditions imposed by Article 10(1)b of regulation no. 3626/82 were satisfied.

French Government challenged this view and contended that it had taken favourable opinion of national scientific authority in importing country for granting of import permits. This argument was rejected as there is no provision of regulation which speaks for the issue of permit with opinion of such authority and secondly it was clear to French authorities that capture of wild cats in question would have a harmful effect on their conservation or on the extent of territory occupied by them. Thirdly export permit submitted to French authority were issued by Bolivian authorities and during that period application of convention in Bolivia was giving rise to serious problems. So French authorities could reasonably have considered that applicant had presented trustworthy evidence satisfying the requirement of Article 10(1)b regulation 3636/82.

Lastly opinion of French Scientific authority is not sufficient, clear and favourable to form a valid basis of assessment.

So it was held that by issuing in February 1986 import permits for more than 6,000 skins of felis geoffroyi and felis weidii species originating
in Bolivia, French Republic failed to fulfill its obligations under Article 10(1)b of regulation no. 3636/82. So French Republic was ordered to pay costs.

4.3.2 Special Protection Area Case

In *Commission of the European Communities Vs. Kingdom of Netherlands*, European communities brought an action under Article 169 of EC treaty for a declaration that by failing sufficiently to designate special protection areas within the meaning of Article 4(1) of Council Directive 79/409/EEC of April 2, 1979 on the Conservation of Wild birds, kingdom of Netherlands has failed to fulfill its obligations under that directive provides that member states are to take requisite measures to maintain the population of all species of naturally occurring birds in wild state in European territory of member state to which the treaty applies at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements or to adapt the population of these species to that level.

Article 3 of directive provides: In light of requirements referred in Article 2, member state shall take requisite measures to preserve; maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred. Preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the creation of protected areas, upkeep and management in accordance with the ecological needs of
habitats inside and outside the protected zones, re-establishment of
destroyed biotopes and creation of biotopes. Article 4(1) of Directive says
about special conservation measures concerning the habitat of such species
in order to ensure the survival and reproduction in their area of distribution
special account shall be taken of species in danger of extinction, species
vulnerable to specific changes in their habitats, species considered rare
because of their small population or restricted local distribution and species
requiring particular attention for reasons of specific nature of their habitat.

Members shall classify in particular the most suitable territories in
number and size as special protection area (SPA) for conservation of
species taking into account their protection requirements in geographical
sea and land area where this directive applies. Commission on 25th
September, 1989 gave Netherlands Government a formal notice to submit
its observation within 2 months.

Netherlands denied charges by letter of 29 December, 1989 in
which it stated full compliance of directive in classifying Special
Protection Areas (SPAs) as well as it stated to have introduced other
instruments for protection of birds. Commission sent the Netherlands
government on 14th June 1993 a reasoned opinion requiring Netherlands
within 2 months from notification of opinion to take the necessary step on
complaint of not having classified as Special Protection Areas sufficient
territories to ensure effective protection of species. Netherlands
Governments stated that it has replied to reasoned opinion by letter of 1st December 1993.

Commission asserted that it never received the reply. Kingdom of Netherlands challenged the admissibility of application as by omitting to take account of its reply to the reasoned opinion, commission failed to respect its right to a fair hearing so the action was inadmissible. Court says even supposing it has received such letter, it doesn’t constitute a ground of inadmissibility as aim of pre-litigation procedure is to give member state an opportunity to justify its position or to comply of its own accord with requirement of treaty. Plea of inadmissibility was rejected.

Netherlands further submitted that it was at this stage of its application to court that the commission raised for the first time the complaint concerning the insufficient total area and quality of area classified as SPA as well as specific complaints concerning the failure to classify the Friesian Usselmeer Coast and Hooge plateau on Western Scheldt. So preventing the defendant from reacting at pre-litigation stage. Fresh water lakes and marshes and moorland were classified as SPAs only to a very limited extent. So those components were inadmissible. Netherlands further submits that report listing important areas for bird in Netherlands (IBA, 94) published after reasoned opinion had been sent to it, was not to be taken into consideration in present proceedings as government was not able to comment on it in the pre-litigation procedure.
Commission contended that it has alleged on basis of an ornithological study published in 1989 (Inventory of Important Bird areas in European Community, July 1989) (as IBA 89) so Netherlands re-enhance on IBA 94 should be rejected as being redundant and SPAs classified by Netherlands were qualitatively insufficient, moreover fresh water lakes, marshes and moorland have been classified as SPAs only up to limited extent whereas according to Article 4(1) classification of SPAs should be in terms of quantity and quality to ensure conservation of species with respect to Netherlands IBA 89 identify on the basis of ornithological criteria (used and explained in study) 70 territories with a total area of 797920 hectares suitable as SPA whereas Netherlands Ministry of Agriculture and Fisheries had drawn up its own list of potentially classifiable territories which contain 53 sites with a total area of 298180 hectares. Netherlands government had no explanation of scientific criteria on which these SPAs has been listed.

Commission submits that obligation to classify is infringed if a member state manifestly disregards the number and area of territories listed in IBA 89 and protection given by Netherlands to species of birds is insufficient as population of nine of those species has declined by over 50% with special significance is the fall of population of species such as Tetrao tetrix and Botaurus stellaris. Netherlands contended that designation of SPAs is one of measures such as Nature Conservation law and sale of sites to nature conservation organization and bird conservation plans. By
doing so it has complied with directive and while adopting special conservation measures as under directive, member state must take account not only of specific factors but also economic and recreational requirements.

Further criteria applied by commission namely member states must designate at least half in number of areas and territories as SPAs. Listed in IBA 89 does not appear in directive and fall in number of species by over 50% is due to disastrous hatching season. Probably caused by an atmospheric deposit originating outside the territory in question and its population is falling throughout European territories and such decline is not due to inadequacy of special conservation measures adopted by Netherlands.

It was replied that Firstly Netherlands has adopted a different criteria of IBA 94 than adopted in IBA 89 in classifying SPAs and that too Netherlands had failed to produce a single document from national procedure for classifying SPAs which indicates the criteria governing SPAs in state whereas IBA89 was prepared for competent directorate general of Commission by Eurogroup Conservation of Birds and Habitats in Conjunction with International Council of Bird preservation and in cooperation with commission experts. So IBA 89 has proved to be only document containing scientific evidence for assessment of SPAs and though it is not legally binding on members but due to its scientific value, court has used it for such assessment and Netherlands has failed to fulfill
its obligation by classifying smaller than half in numbers of the total area of territories suitable for classification as according to 4(1) of directive so Netherlands has been essentially unsuccessful it must be ordered to bear the costs.

4.3.3 Protecting Aquatic Environment

In Commission of European Communities Vs. Kingdom of Belgium,\textsuperscript{13} Commission of European Communities brought an applications under Art.169 of European Community treaty for a declaration that kingdom of Belgium has, by not adopting pollution reduction programs including quality objectives for water in respect of 99 substances listed in Annexure to the application or by not communicating to commission summaries of such programs and the result of their implementation, infringed Article 7 of Council directive 76/464/EEC of 4 May, 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of community and has failed to fulfill its obligation under EC treaty. According to Article 6 of Directive council shall lay down the limit value which emission standards must not exceed for various dangerous substance including in families and group of substances with in List I (Categorised by directive as List I and List II) and such limit value shall be laid down on basis of toxicity, persistence, bio-accumulation.

Article 7 of Directive provide that member state shall establish programme in the implementation of reducing pollution of waters by
substance of List II of which they shall apply particular methods as prior authorization by competent authority in member state concerned in which emission standards shall be laid down based on quality objectives for waters fixed according to council directives. Programme shall set deadline for implementation. Summaries and result of such implementation shall be communicated to commission and commission shall arrange for regular comparisons of programs to make its implementation effective on 26th September 1989. Commission sought from Belgian government sight of pollution reduction programs covering those substances.

On 14 Dec, 1989 Belgian sent a series of emission limit valve. However Commission still wished to received information on setting of quality objectives for those substances and related pollution reduction programs. On April 4, 1990 Commission sought from Belgian Government list of 99 substances which had been discharged into Belgium’s aquatic environment and also qualitative objectives applicable at the time when discharge authorisation had been granted. Belgian Government didn’t reply to letter. Commission initiated procedure under Article 169 of treaty giving Belgian government 2 months notice to submit its comment on infringement of Article 7 of directive on 26th February, 1991.

In response to letter Belgian Government reply that they fulfill the obligations related to reduction programme. Belgian Government put forward a document titled, “Flow to North Sea: Belgian emissions of dangerous substance into air and waters during period 1985-95” as fuel
commitment to third international conference on Protection of North Sea 
Hague, 1990. Commission refused to accept both letters as well as 
document forwarded for justification of Belgian authorities in adoption of 
reduce programs. Belgian Government contended as five years have been 
lapsed between date of reply of notice and reasoned opinion and it was 
capable of creating uncertainty. So commission inaction itself was a 
defense for Belgian. Both pleas were rejected Belgian Government raise 
the question that list of 99 substance was not legally binding which clear 
the fact that council resolution has no legal force and according to contents 
of resolution. List in question was to serve simply as a basis for continuing 
work and as a provisional basis for any national measures.

Commission argued that though Council resolution was not legally 
binding. But 99 substances at issue are legally relevant simply by virtue of 
their inclusion in List II of Annex to directive as these substances were 
concluded after research undertaken by commission with help of 
representatives of member states. Further programme to be established 
under Article 7 of directive must be specific and objective of reducing 
pollution pursued by general purification programs does not necessarily 
correspond to more specific objectives of Directive (after taking view of 
flow to North document of Belgian Government). Moreover those 
programme must be communicated to Commission in a form which 
facilitates comparative appraisal and their harmonized implementation in 
all the member states and Belgian Government national measures doesn’t
meet such criteria as these don’t cover all substances as listed by commission and secondly Belgian Government hasn’t specified, which substances are relevant in the national context and document forwarded by Belgian government does not embody comprehensive arrangement for reduction of pollution in accordance with the quality objective set for the waters affected as these are only adhoc measures. Court therefore, held that Belgium has failed to fulfill its obligation under Article 7 of directive 76/467/EEC of 4 May, 1976 on pollution caused by certain dangerous substances discharged into aquatic environment of community so kingdom of Belgium is ordered to pay costs.

Present case elaborate the view through a document is non-binding. It could be considered if it has some stances as gist of it lies with the effective control regime to curb pollution and to provide neat and clean environment as a fundamental right.

4.3.4 Hellenic Republic Case

In Commission Vs. Hellenic Republic,14 in the case the question for decision come before Court whether Hellenic Republic has failed to fulfill its obligations and under EEC treaty to take necessary measures to ensure that solid waste, toxic and dangerous waste are disposed off without endangering human health and without harming the environment as according to council directive 75/442/EEC of 15 July 1975 on waste. Member states have to take measures necessary to ensure that waste (toxic
and dangerous waste) is disposed of without endangering human health and 
without harming the environment and in particular without risk to water, 
air, soil and plants or animals without causing a nuisance through noise or 
odours or without adversely affecting the countryside or places of special 
interest.

According to Article 5 and 6 of Directive member states are to 
designate the competent authorities responsible for organizing operations 
for disposal of such waste. Article 7 require member state to take necessary 
measures to disposal of waste. Commission asked Greek government for 
information regarding the existence of a rubbish tip at the month of river 
Kouronpitos.

Greek Government replied that it was going to put an end to the 
operation of that rubbish tip and create new disposal sites. However till the 
completion of necessary work on infrastructure of new sites waste from 
district of Chania would continue to be discharged on the rubbish tis by 
Kouronpitos. Commission state the answer unsatisfactory. Greek 
authorities replied its inability due to opposition by population of Chania to 
create new sites for burial of waste and now authorities are considering 
medium term of waste burial sites in small towns. Commission issued 
reasoned opinion in 1990. Greek authorities didn’t reply to that. 
Commission decided to commence proceedings. Greek government 
contended that first letter of commission didn’t make any reference to such 
waste so action was not a formal notice rather mere invitation to Greek
government to inform Commission of its view regarding the matters stated in complaint by certain individuals. Commission further contended that no measures were taken by Greek government to dispose of the waste. Whereas Greek government reply with several studies which had been undertaken between 1989 and 1991 regarding management and recycling of waste from Chania area and suspension of implementation programme was due to opposition of population but court rejected the plea and old member state couldn’t plead domestic difficulties. In view of above arguments court held that Hellenic republic has failed to fulfill its obligations so has to pay the costs.

One aspect which strives here is individual too can approach court through commission though ECJ has no provisions to entertain individual complaints directly but though commission of European Communities. It has given its assent to individual access to Court though indirectly and it is a glorified step towards achieving its goal of human rights.

4.3.5 Openbaar Case

In Openbaar Ministerie Vs. Godefridus Jozef Vander Feesten,\textsuperscript{15} Criminal proceedings against defendant were arisen under Netherlands law on Birds of 31 Dec, 1996 which prohibits offer to keep, offer to purchase, offer for sale, sell, deliver, transport, offer to transport, import; provide for transit of or export from territory of Netherlands any bird in Europe or any derivatives of such birds. Criminal proceeding were held as following the
seizure of defendant house number of birds belonging to subspecies *carduclis cardudis caniceps* or grey headed goldfinch imported from Denmark were captured. Since it was unsure whether Netherlands Legislation under which birds in question were seized correctly transposed the directive, national court decided to stay the proceedings and to refer following questions to court for a preliminary hearing rather can be said as advisory opinion.

1. Is National Legislation which protects bird (within meaning of directive 79/407/EEC of 2 April, 1979) belonging to subspecies which doesn’t at all occur naturally in the wild in the European territories of number states. Compatible with working or objective of directive?

2. Does it make any difference to answer to Question 1 that competent authority of member states in question may determine that, for proceeding authorities which have the requisite degree of expertise, the substance in issue cannot be distinguished from birds of species, of other subspecies of main species?

3. If it could be decided that measures in issue is a stricter measure with in the meaning of directive, does it make any difference that birds in question were imported from other member state which could have introduced same stricter measures.

Court said that preamble of directive visualize that the population of birds are declining and a threat to conservation of natural environment and
species of wild birds naturally occurring in European Treaty are migratory species and such species constitute a common heritage and effective bird protection is typically a transfrontier environment problem entailing common responsibility and directive covers the protection, management and control of these species and lay down rule for their exploitation. Concept of specie include all of a species subdivisions such as breeds and subspecies and all other subspecies of species in question including those which are not European will be covered by directive and concept of subspecies is not based on distinguishing criteria which are as strict and objective as those defining species inter-se.

It follows if scope of directive to be limited to species which occur in European territory and not to other. It would be difficult to implement it. So answer given to first question by court was that directive applies to bird subspecies which occur naturally in wild only outside the territory (European) of member state of specie to which they belong or other subspecies of that species occur naturally in wild within the territory in question and in view of reply to first question court held the second and third question are redundant.

How effective is the cooperation among European countries on the matter of environment protection and how it feel obliged to take light from grundnorm like EEC treaty and certain directives issued collectively by all states in view of protection of certain rights of Human beings and for the removal of misconception of any provision they have to take opinion of
highest authority of Europe i.e. European Court of Justice, is a positive development.

4.3.6 Breach of Community Law Case

Further in *The Queen Vs. Ministry of agriculture and fisheries, food, ex parte: Headly lomas (Ireland) Ltd.*, High Court of Justice of England and Wales Queen’s Bench division preferred to European Court of Justice for interpretation of Article 34 ad 36 of EC treaty and principle of non-contractual state liability for breach of community law. These questions had been raised in above cited case when ministry refused to issue a license for export of live sheep to Spain requested by Headly Lomas in 1992 as treatment in Spanish’s slaughter house was contrary to Council directive 74/577/ECC of 18 Nov, 1974 on stunning of animals before slaughter.

Court elaborated that as it was clear from directive’s preamble to avoid all forms of cruelty to animals and as a first step to avoid all unnecessary suffering on part of animals when being slaughtered. Article 1 and 2 of directive further required member states to ensure stunning, by appropriate approved methods, of animals for slaughter of following species namely: bovine animals, swine, sheep, goats, solipeds. Kingdom of Span had to comply with it from the date of its accession to community on 1 January 1986. Directive was transposed in Spain by Royal decree of 18 Dec, 1970 which reproduces in particular the provisions of Article 1 and 2 of directive and specifies as approved methods of stunning, the use of a
captive – bolt gun or pistol electric shock or carbon-di-oxide. It doesn’t lay down any penalty for breach of its provisions. Despite the adoption of decree, Ministry of agriculture Fisheries and Food convinced by the information given by Spanish society for protection of animals that complying with directive either they don’t have stunning instruments or those are not working proper.

In 1992 Commission informed U.K. that the ban on export of live animals to Spain is contrary to Article 34 of EC treaty. Ban was lifted following a meeting between 2 countries with a decision that export of animals will be there only those slaughter houses as confirmed by Spanish authorities. But license to export was not issued to Hedley Lomas despite the fact that slaughter house in question was approved and complying with directive and there was no contrary evidence there. Ministry got the plea that denial was justified under Art 36 of treaty and compatible with community law. For further interpretation, High Court stayed proceedings and referred case to European Court of Justice for a preliminary ruling.

Questions referred were:

1. Does the existence of a harmonizing directive which doesn’t contain any procedure or sanctions for non-competence prevent a member state from relying on Article 36 of EEC treaty to justify measures restrictive of exports in circumstances where there is a failure of another member to secure results required by directive?
2. Does Article 36 entitle member state to prohibit export of live sheep to another state for slaughter?

3. Is a member state liable as a matter of community law to compensate a trader in damages for any loss caused to trader by failure to grant export license, if so what liability and compensation will be there.

4. Court held in first question that community law precludes a member state from invoking Article 36 of treaty to justify a limitation of exports of goods to another member state on ground that such another state is not complying with requirements of community harmonizing directive which pursue the objective intended to be protected by Article 36 but doesn’t lay down any procedure to monitoring their application or any penalty in event of their breach. Court found it unnecessary to reply second question in view of first answer. In respect of third question court says principle of state liability for loss and damage caused to individuals as a result of breaches of community law for which state can be held responsible is inherent in system of treaty.

Right of separation must be recognized where three conditions are met; (1) rule of law infringed must be intended to confer right on individuals; (2) breach must be sufficiently serious; (3) there must be a direct casual link between breach of obligation resting on state and damage sustained by injured parties so in answer to third question state has an obligation to make reparation for damages caused...
to an individual by refusal to issue an export license where all above conditions are met.

Hereby Court also concluded though individual can’t directly in way of compensation claimed from State.

4.3.7 **Kingdom of Spain Case**

In a recent case of *Commission of European Communities Vs. Kingdom of Spain*, Commission of European Communities brought an action against kingdom of Spain under Article 169 of treaty (Now Article 226 EC) for a declaration that Spain has failed to fulfill its obligation under EC treaty by failing to establish programme concerning the protection of waters against pollution caused by nitrates from agricultural sources pursuant to Article 5 of Court directive 91/676/ EEC of 12 December, 1991. Royal decree no. 261/ 1996 of Feb/ 1996 on protection of water against pollution caused by nitrates from agricultural sources transposed the directive into Spanish law. Article 3(3) of directive provides to designate vulnerable zones with 2 years of notification of directive whereas Article 5(1) provide for establishment of action programs in respect of designated vulnerable zone within 2 years from initial designation under 3(2).

Commission invited Spain by a formal notice on 4 April, 1997 to submit its observations regarding and a reasoned opinion on 21 Nov, 1997. Spanish Government replied forwarding Commission a document entitled,
"Four yearly report on application of Directive 91/676/EEC". Now Commission says that Spain was under obligation to adopt and communicate the measure necessary to comply the directive within prescribed period and despite of expiry of time limit, Spain has not adopted the national provisions to ensure compliance in national law with obligations imposed by Article 5 of directive.

Spanish Government explains that obligation to designate vulnerable zones lies on autonomous region since Article 4 of Royal decree No. 261/1996 provides that they are responsible for such designation. Court held that neither the division of powers as between State and autonomous regions nor the obligation to comply with directions given in national Legislation transposing the directive into national law can serve to justify failure to comply with obligations imposed by directive.

Further Spanish Government took plea that Commission ought to have based its action on late transposition of directive into Spanish law. Since Commission didn't base its action on failure to implement the directive into Spanish law in due time, there is no point in bringing successive actions directed against the failure to comply with individual time limits set by directive. Court observed that member state could not plead their late implementation of directive as justification for failure to fulfill other obligations by directive and if Spain was late in implementing directive, it is no way to justify its failure. Since action programme under Article 5 of directive have not been drawn up in time so Commission
action is well founded and Spain has to pay costs as it failed to fulfill obligations.

4.4 Escape Theory of International Court of Justice

Now here comes the turn of International Court of Justice to prove its contribution which only could be cleared by way of judicial decision as delivered by International Court of Justice most important and prominent is Nuclear test case which is the mirror of whole body of International Court of Justice regarding effectiveness.

4.4.1 Nuclear Test Case

France persisted in conducting Nuclear tests in its Polynesian territories, Despite the uproar of several countries. It directly affect the two states specially Australia and New Zealand as immense Nuclear fall out and radiation was deposited in these territories and also in the non-self governing territories of Nine, Tokelau islands, associated States of Cooks islands, Western Samoa as areas under the control of Australia and New Zealand. Large area of high Seas and atmosphere was contaminated. Though French Government had assured, yet due to unforeseen shift to air currents took place which deposit more radioactive material than as anticipated Australia and New Zealand approach International Court of Justice to sought a judgement whether nuclear testing, which resulted in deposition of nuclear fall out on the territories of concerned state, was a
violation of International Law. But surprised fact is this no claim for compensation was made despite of scientific evidence.

New Zealand maintained the plea that not only Sovereign states are at risk but the people inhabiting the South Pacific regionally constituted by grouping Australia, New Zealand, Fiji, Western Samoa and Cook Islands are in danger and it make obvious that Notion of Pacific peoples include those French nationals residing in French Polynesia who would be the target of direct radiation. Both states (Australia and New Zealand) raised the issues of infringement of traditional law particularly the right of a sovereign state to protect absolute integrity of its territory. Two main traditional submissions in both cases were: (1) Territorial integrity; (2) National Sovereignty.

Argument raised was penetration of territory by Nuclear fall out violated the sovereignty of two states as it was argued that only the sovereign has the right to determine the amount of nuclear radiation permitted in its territory and air space, and under international law only sovereign has the right to determine the degree of fall out affecting its population. Both states demurred the contamination of international territory primary, high seas and air space above.

Australian government in its application cried against violation of its rights under International law as well as United Nation Charter in these regards firstly as Right of Australia and its people in Common with other
States and their people to be free from atmospheric nuclear weapon tests by any country has been violated. Secondly the deposit of radioactive fall out on territory of Australia and its dispersion in Australia air space without Australia’s consent violates Australian Sovereignty over its territory, impairs Australia’s independent right to determine what acts shall take place within its territory and in particular whether Australia and its people shall be exposed to radiation from artificial sources.

Thirdly pollution of High Seas by radioactive fall out, constitute infringement of freedom of High Seas. More modest assertion of Human rights of people relies on Article 55 and 56 of United Nations Charter which says about the cooperation of all States in solving Problems of health, raising, living standards of human beings. What type of cooperation France has shown in present case and what peaceful solution has been delivered by so called International Court of Justice is very well clear from the study of this case which is considered as gross injustice towards Environment as well international community’s faith on International Court of Justice in delivering the right justice.

Australia develop her arrangement on basis of human rights of people to be free from injuries arising from Nuclear fall out but New Zealand reasoned his case on human right of all people rather not on subjects only. New Zealand says nuclear testing by France violates international law as it violates the right of all members of International community, including New Zealand, that no nuclear tests that give rise to
radioactive fall out be conducted. Secondly, it violates the rights of all member of International Community including New Zealand, to preservation from unjustified artificial radioactive contamination of terrestrial, maritime and aerial environment and in particular in the environment of region in which tests are conducted and in which New Zealand, Cook Islands, Nine, Tokelau Islands are situated.20

Australia forward five grounds to prove his legal interest in the case firstly factual premises of the nuclear tests, secondly main elements of Australia's legal case, thirdly legal interest of Australia to sought a judgement that under existing general international law. France is obliged towards every state so towards Australia to abstain from conducting nuclear tests, fourthly legal interest of Australia to obtain a judgement that its sovereignty over and deposit on its territory and dispersion of its Air space of radioactive fall out from French Nuclear test, fifthly legal interest of Australia to obtain a judgement that Nuclear tests by France, represent a violation by France towards Australia and other States concerning freedom of Seas. Stockholm conference adopted the same contention of obligation of one towards other states.21

Wilfred Jenks gives an idea of generous interpretation of requirement of legal interest will help to permit the settlement of disputes before they deteriorate and seriously disturb friendly relations among States but what could be worst than an opinion rather conclusion made by a supreme authority of control regime of violation of Human right when
judge De Castro of International Court of Justice said that Australia has no legal title authorizing it to act as spokesman for international community (as according to Australia’s fourth contention to prove her legal interest) and to ask Court to condemn France’s conduct. Court cannot go beyond its judicial functions and determine in a general way, what are the duties of France. With regard to freedom of Sea as these are the subjects of Political Domain and must be rejected as a general international law. Applicant is not entitled to ask Court to declare atmospheric nuclear test unlawful.

What a Curse! Here quotation from Guru Granth Sahib proves right which says When King or Person who has to deliver justice himself is having a view related to injustice, How could we expect justice then.22

Here Judge become escapists from their duties to give justice to Human kind should be at any cost. But in present text it is very well clear that instead of delivering right justice, judge proves the concept of kaliyug i.e. Age of Strife/ Battle or Dark Ages where it is difficult to sought justice with right approach. Rather it has proved Herbert Spencer’s theory which was further elaborated by Darwin (Charles Robert Darwin) i.e. “Survival of fittest in struggle for existence”.

Judge further elaborated that Applicant doesn’t have shown it’s Material legal interest and request that court make a general and abstract declaration as to existence of rule of law goes beyond court’s judicial functions. This is totally against the spirit of Universal Declaration of
Human Rights which give the right to recognition everywhere.\textsuperscript{23} as a acting in a capacity of person though in representative capacity of their nationals and also against the spirit of same historic remedy and recognized right to social security through international cooperation.\textsuperscript{24}

Further Judge goes to say that court has no jurisdiction to declare that atmospheric nuclear tests and unlawful even if as a matter of consequence it considers that such tests or even all nuclear tests in general are contrary to morality and to enemy humanitarian consideration.\textsuperscript{25}

Purpose of a judicial organ is to decide each issue rightfully with all consideration of moral as well as legal obligation. By giving such dissenting and pessimistic opinion hurt the grace and dignity of the super court of World, the control regime of all issues related to violation of Human Rights Court does have jurisdiction to pronounce on collective interests of international community as visible in present case. In this case Human Rights and applicants interests to safeguard the corresponding interest of international community cannot be separated. Judges expressly refrained themselves from expressing any opinion.

Further request for interim protection was made when Australia raised the issue that the radio active debris which nuclear explosive has deposited into our social has invaded our people bones and lungs and critical body organs and every man, woman and child and foetus in Australia has in his/her body radio active material from French as well as
other atmospheric tests resulting in ionizing radiation which are harmful down to smallest dose.\textsuperscript{26}

Australian submission continues in saying that France has acted against wishes of world community and benefited her by these harmful tests and France wish to continue them and Australian citizens will pay and have paid a price for the conduct and so severe was the danger that International Court was asked to indicate immediate steps.

One of the grounds raised in support of both countries was Stockholm Declaration with special emphasis on Article 21 which give states sovereign right to exploit its natural resources with an obligation not to cause damage to environment of other States or areas beyond the limits of natural jurisdiction.

Moreover this declaration was adopted by General Assembly, which shows the will of world community towards this objective. But alas! Resolutions of General Assembly though adopted unanimously are morally binding in Character. No legal force can be used to make these legally binding which is to great loophole in effecting implementation of functional aspect of International Court of Justice.

Moreover, in its resolution 31 conference referred to radioactive contamination of environment from nuclear weapon and expressed its belief that all exposure to mankind to radiation should be kept to minimum possible and should be justified by benefits obtained and it resolve to
condemn nuclear weapons test, especially carried in atmosphere and to call upon those states who intend to carry on tests to abandon their plan to carry such test as they made lead to further contamination of environment. Besides this principle 7 of Stockholm conference called upon States to prevent pollution by taking all possible steps whereas Principle 6 halt the discharge of toxic substance that cause serious or irreversible damage to environment as well as Principle 21 impose responsibility on States not to cause damage to environment of other states.

We can conclude by these provisions this that it imposes direct obligations on states but when it is not recognized by International Court of Justice then How could it be an obligation. Moreover a legal obligation, it may be a moral obligation than a legal one.

Does Stockholm represent the whole of world community wishes though it was adopted by General Assembly? Does International Court of Justice respect the obligation of States or resolution of General Assembly by deciding that there is no legal interest or locus-standi arisen? Rather it could be said that Stockholm conference was a moral obligation, which International Court of Justice didn’t even bother.

In Present case, majority of judges didn’t decide if court had jurisdiction or even complaint was admissible three of dissenting judges felt that no valid claim had been present upon which court could act27 and claim of Australia without object. Court held that no useful purpose would
be served by further proceedings. Since the subject matter of controversy has disappeared the cessation of testing rendered the dispute moot and court went on to hold that a determination of questions of jurisdiction and admissibility would be without object. Judge Petréń reasoned at the time of Australian application, International Law had not reached the state of affording environment protection and applicant presupposes existence of customary international law which prohibits states to cause atmospheric nuclear tests and to deposit radioactive fallout in other state territory. France has not violated international law and she should be given equal treatment that given to all other states possessing nuclear weapons.

Role of International Court of Justice appears to be rather degrading and pessimistic in view of approach adopted by majority. Is it possible and can be assumed that environmental disputes become moot simply by cessation of offending conducts.

It believes in escape theory, very clear from the decision as well as by another decision which can be quoted here is of WHO request for advisory opinion on legality of use of nuclear weapons in armed conflict or war by States

4.4.2 Escapism from Reality: Legality of Nuclear Weapon Case

How wrong are the decisions of International Court of Justice can be very clearly judged by another aspect where World Health Organisation requests to International Court of Justice to deliver its advisory opinion on
use of nuclear weapons by a State in war or armed conflict resulting in
degraded environment and health as whether it is a breach of international
law including WHO Constitution.28

International Court of Justice has an authority to give an advisory
opinion by virtue of Article 65 of its Statute, Paragraph 1 of which read as,
"The Court may give an advisory opinion on any legal question at the
request of whatever body may be authorized by or in accordance with the
charter of United Nations to make such a request (See Annexure). Article
96(2) of Charter speaks that specialized agencies, which may at any time
be authorized by General Assembly may also request advisory opinion of
Court on legal questions arising within the scope of its activities. So three
requirement should be fulfilled.

1. Agency requesting the opinion should be duly authorized under Charter
to request such opinion.

2. Opinion requested must be on a legal question.

3. This question must be one arising within the scope of activities of
requesting agency.

Regarding first essential, court says no doubt can be raised about the
authorization of World Health Organization in accordance with Article
96(2) of Charter to request advisory opinion.
In respect of second essential court speaks question put to Court is a legal question as the Court is requested to rule on whether in view of health and environment effects, use of nuclear weapon by State in War or other armed conflict would be a breach of its obligation under International Law including World Health Organization Constitution.

Court has to identify the obligations of States under the rules of law invoked and assess whether behaviour in question conforms to those obligations, so giving an answer to this question has a base in law. Hence legal question.

Regarding third essential for advisory opinion court says Charter of United Nations laid the basis of a system designed to organize international cooperation in a coherent fashion by bringing United Nations invested with powers of General scope into relationship with various autonomous and complementary organizations, invested with Sectorial powers. The exercise of these powers by organisation is coordinated by relationship agreements concluded between United Nations and each specialized agency.

According to rule on which system is based, World Health Organisation by virtue of Article 57 of Charter has “Wide responsibilities” and those responsibilities are necessarily restricted to sphere of “Public Health” and cannot encroach on the responsibility of other parts of United Nation System and there is no doubt that questions concerning the use of force, regulation of armaments and disarmaments are within the
competency of United Nations and lies outside that of specialized agencies. Court consider that third essential for the advisory opinion is not proper and fulfilled and request for advisory opinion submitted by World Health Organisation relates to a question not arising within the scope of its activities. So request for an opinion requested is rejected by 11 to 3 votes.

This sort of judgement is escapism from its responsibilities rather subterfugism. A genuine glimpse of question raised by WHO can show that if duty of World Health Organisation is to protect Health and Environment then it means each and every aspect of these two. It hardly makes any difference if the issue is of use of nuclear weapons or of various Government policies of implementation.

To conclude by a vague way that this question doesn’t arise within the scope of activities of requesting agency leads to an impression which is totally irrational and shrugging off the responsibility from shoulders where else could these agencies approach when highest justice delivering body has shown its incapability or rather it could be demonstrated in one phrase “Power is language of capability” and the court has proved in its advisory opinion given to General Assembly on the legality use/ threat of Nuclear weapons in response to a resolution adopted by General Assembly as here States were the parties where such sort of decisions have to be implemented and what a vice! Agency which has to implement the opinion don’t have compelling reasons to invoke jurisdiction even advisory

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jurisdiction of court but for the benefit of whose it is claimed has compelling reasons to invoke it.

In this case states argue that any use of nuclear weapons would be unlawful to existing norms relating to safeguarding and protection of Environment. Reference were made to Additional Protocol I of 1977 to Geneva Convention of 1949 whose Article 35(3) prohibits the employment of methods or means of warfare which are intended or may be expected to convention on prohibition of military or any other hostile use of environmental modification technique, which prohibits the use of weapons which have widespread, long lasting and severe effects on the environment. Also cited was Article 21 of Stockholm Conference 1972 and principle 2 of Rio declaration 1992 which express that State have a duty “to ensure that activities within their jurisdiction or control don’t damage environment of other states or of areas beyond the limit of their national jurisdiction.

Here in present case court recognize the threat to environment and said use of nuclear weapons would constitute a catastrophe to environment. court recognize also that Environment is not an abstraction but represents living space quality of life and very health of human beings including generations unborn and existence of general obligation of States as enumerated in Article 2 of Rio declaration and Article 21 of Stockholm declaration is now part of Corpus of International Law relating to environment.
What happen when WHO seek advisory opinion? Now Court conclude Health is Environment and obligation of States to protect it. Why it is not an obligation of International agencies and organisations to protect it when they develop, they implement and make policies on such issues were these the activities out of scope of WHO.

Need is of review by court of its judgement as given in Nuclear tests case in 1974 as well as in case of advisory opinion to WHO to widen the parameter of justice and implementation. In present case court by 13 votes to 1 decided to comply with the request for an advisory opinion by General Assembly and decided a threat or use of force by means of nuclear weapons that is contrary to Article 2(4) of United Nations Charter and that fails to meet requirements of Article 51 is unlawful. But Court was unable to declare that such use be unlawful in case of self defence or not and there exist an obligation to pursue in good faith and bring to conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control, but how? Whether this is a legal obligation, whether court has imposed it as legal still we are in predicament and it is yet to be decided.

4.5 Overview

International Court of Justice has needed to review its Statute which states that only States be the party to its Statute. Secondly rule of no
precedent as enumerated in Article 59 of Statute and Individual didn’t have any access to court should be changed.

In end it could be said that small is effective especially in present context of delivery of justice. Best examples are transboundary pollution control decisions which makes to us clear that international cooperation can lead to achieve the purposes enumerated in Charter as well as UDHR 1948 and pollution can be controlled well. European Court of Justice has remarkable contribution but it was possible only when whole Europe has bound itself in one unit of justice.

It is size which matters but spirit to cooperate matters more. Examples can be quoted of number of cases decided by European Court of Justice in relation to environment whereas International Court of Justice has in comparison to European Court of Justice minute number of cases. Regional and bi-national cooperation in delivering justice has been proved more as compared to International Court of Justice.

Secondly, in most of cases it has been seen that International Environmental law is mostly Euro-centric or USA centric as in Asia due to lack of knowledge as well as cooperation among states, it was not so detectable to construct its aspects in International Environmental law. Theory of small is effective can be brought forward where large bodies try to escape from responsibilities then recourse to Regional or bi-national
bodies or law is the most effective remedy as visualized by present practice of delivering justice in world.

It is clear both courts have played different role in development of International Environmental Law. European Commission and European Court of Justice has shown more effectiveness in protecting the most vulnerable environment than International Court of Justice. European Court of Justice has seized opportunity to make a practical contribution by giving considerable degree of support to environment arguments based on case to case and has also extended weight of application of economic objectives. European Court of Justice has that contribution without which European Environment Law wouldn’t have that development as it has now. International Court of Justice has yet to make such contribution but it has shown his unwillingness as in cases regarding Nuclear tests and World Health Organisation for advisory opinion. It has a dire need and keen interest to be improved by all aspects.
References


2. Ibid. 336.

3. Article 14 of German Constitution guarantees the property and inheritance rights and talks of use of property in public interest.


6. Unforeseen circumstance (French term) e.g. war which keep Sb from keeping promises.


11. Article 10(1)(b) of regulation provides import permit shall be issued only where, it is clear or applicants present trustworthy evidence that the capture or collection of specimen in wild will not have a harmful effect on conservation of species or on extent of territory occupied by populations in question of species.


13. Case C - 207/97 (not yet published, Courtesy Internet- www.yahoo.com)
15. ECR, 1996, I-355
16. ECR, 1996, I-2553
17. Case C – 274/98 (decided on 13th April, 2000; not yet published, Courtesy Internet – yahoo.com)
22. Ulti Waar Khet Ko Khayé……. (Guru Granth Sahib)
24. Ibid, Article 8 and 22.

