

R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement (1994) – ‘Financial Prudence, Interfering Busybodies’

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INTRODUCTION

Oliver Wendell Holmes Jr. once stated that taxes are what we pay for civilized society.¹ Assuming the truth of this statement, one might well wonder which ‘civilised society’ is one’s tax paying for. The questions to what use is tax revenue being put, and, is such use appropriate, are of antiquity. The power of the state to tax its citizens and/or residents is undoubted. So is the power of the state to tax activities – even the ones that it cannot prevent.² Reliance on divine laws and masonic symbolism to reject such power is doomed to failure.³ Complaints against the use for certain purposes of tax revenues are similarly doomed, if the intent is to impugn the tax itself.⁴ However, complaints are sometimes tenable – perhaps more so when the civilised society that one’s tax is paying for is in another country. This calls to mind ‘the largest cash sum ever provided for a single scheme under the Overseas Development Administration’s Aid and Trade Provision’⁵ – the outcome of a decision of HM government to provide aid to fund the construction of a hydro-electric power station on the Pergau river in Malaysia’s Kelantan state. In *R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd*⁶ (*Pergau Dam*) the Divisional Court held that the government’s decision was unlawful, causing the government considerable embarrassment and diplomatic and international trade difficulties.

The complainant, the World Development Movement (‘the WDM’) was a pressure group dedicated to improving the quantity and quality of British aid to other countries.⁷ The WDM had nothing to do with the construction project or the relevant aid provision. In essence, it could possibly be seen as a ‘busybody in other peoples’ affairs’. For its challenge to be entertained – and upheld – by the court, raises questions that will be familiar to public lawyers. It is one thing to claim to be interested *qua* taxpayer or ratepayer in how public revenues are spent. But what was the interest of the WDM in the matter? What makes any such interest legitimate? Is the manner wherein tax revenues are deployed an appropriate subject of judicial determinations? On what basis can a political decision to grant overseas aid from central funds be considered ‘unlawful’? The immediate aftermath of the case raised controversies (not canvassed in the case) relating to the tying of aid to trade, alleged corruption, and alleged racial slurs, resulting in damaged trade relations, and the subsequent refocusing of aid on poverty alleviation. These will be examined in this discussion, which will hopefully demonstrate how truly a landmark is *Pergau Dam*.

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¹ *Compania General de Tabacos de Filipinas v Collector of Internal Revenue* 275 US 87, 100 (1927).

² See Holmes J in *Compania*, *ibid*.

³ *Lloyd v Taylor* (1970) 46 TC 539 (Ch).

⁴ *Cheney v Conn* [1968] 1 WLR 242 (Ch).

⁵ National Audit Office, *Pergau Hydro-Electric Project* (HC908) (HMSO 1993), [1].

⁶ [1995] 1 WLR 386, [1995] 1 All ER 611 (QB).

⁷ The WDM is now called ‘Global Justice Now’ (see <http://www.globaljustice.org.uk/about-us>). In its incarnation as ‘Global Justice Now’, it describes itself as ‘a democratic social justice organisation working as part of a global movement to challenge the powerful and create a more just and equal world’.

TWO PRIME MINISTERS

Mrs Margaret Thatcher was the (Conservative) UK Prime Minister. Dr Mahathir Mohamed was the Malaysian Prime Minister. Malaysia was in a state of rapid growth, and was experiencing a ‘very rapid rise in demand for electricity and the need to expand generating capacity’.⁸ Malaysia’s increasing economic clout was not something that the UK could afford to ignore. Thus, ‘strenuous efforts were made by British companies, and by Mrs Thatcher and her ministers on their behalf, to take advantage of Malaysia’s booming economy and ambitions for a modernised defence force’.⁹ Unsurprisingly, Dr Mahathir wished to diversify Malaysia’s energy resources. He also ‘wanted a major project for backward Kelantan state’.¹⁰ Building a hydro-electric dam on the Pergau river would achieve both objectives. So, Dr Mahathir wanted the dam, ‘and wanted it badly’.¹¹ If this could be done with British aid, so much the better. For free trade enthusiast Mrs Thatcher, interest in overseas aid apparently revolved around securing benefits for British exporters, winning and keeping friends, and dealing with humanitarian crises.¹² Crucially,

The idea that poor countries had a moral right to aid and the rich had a moral duty to provide it was foreign to her. Mrs Thatcher believed that “charity begins at home”; and at least as far as British tax-payers’ money was concerned, it should pretty much end at home.¹³

Prudential deployment of taxpayer revenues was thus important to Mrs Thatcher, and, if providing overseas aid could help secure contracts for British companies, that could well secure the desired value for money. The setting for a great drama was thus complete.

MONEY TROUBLES

The Pergau river had been identified as a potential site for the construction of a hydro-electric power station, and was considered a priority site by Malaysia’s Electricity Authority. The World Bank’s 1987 power sector report on Malaysia had recorded the Pergau river as a possible 211 megawatt hydro-electric power station, but had concluded that Malaysia should concentrate entirely on gas-fired electricity generation until the turn of the century.¹⁴ In late 1988, a British consortium, having informed the Department for Trade and Industry (‘DTI’) of its interest in the Pergau dam site and that it would be seeking an ‘aid and trade provision’ (‘ATP’) in relation to the site, submitted an application to the Overseas Development Agency (‘ODA’) for an ATP. Indicative costs of £315m were subsequently revised to £316m, with a UK content of £195m. Following a verbal report from the short appraisal mission sent to Malaysia¹⁵, Mrs Thatcher made a verbal offer to Dr Mahathir of ATP support for the Pergau Dam project, of up to £68.25m, conditional on a full economic appraisal. The appraisal mission subsequently reported that the project’s economic viability was, at the consortium’s price of £316m, ‘marginal’. The consortium’s budgetary estimate was later increased to £397m – considered by an ODA economist to have now moved the project’s viability from ‘marginal’ to ‘uneconomic’. Nevertheless, a formal written notice of HM Government’s offer was sent to the

⁸ Tim Lankester, *The Politics and Economics of Britain’s Foreign Aid* (Routledge 2013) 23, 51.

⁹ Lankester, 25.

¹⁰ Lankester, 139.

¹¹ Lankester, 48.

¹² Lankester, 33.

¹³ *Ibid.*

¹⁴ National Audit Office, HC908, [8].

¹⁵ HC908, [14]. The Public Accounts Committee (‘PAC’) of the House of Commons considered this appraisal to be ‘superficial and inadequate’ (Treasury Minute on the 17th Report from the PAC, 1993-94, Cm2602, [1]).

Malaysian government. HM Government faced a dilemma of four options, thus described by Sir Tim Lankester, Permanent Secretary in the ODA;

(i) a formal offer of £397m., which was inconceivable on the economic view which had been taken; (ii) withdrawing the offer, which was politically impossible; (iii) confirming an offer at £316m., which was not tenable in view of the price rise; and (iv) making an offer based on £316m., but with an indication of willingness to discuss the possibility of further assistance.¹⁶

The fourth option was chosen. The ODA, after further economic appraisals, considered the project to be 'a very bad buy', which would not be an economic proposition until 2005 at the earliest¹⁷, that gas turbines would be cheaper, and that it would cost Malaysians £100m more for their electricity over 35 years than the cheaper alternatives. At this point, the Permanent Secretary considered the project to be 'unequivocally a bad one in economic terms'. A further ODA economic appraisal priced the project at £417m, which would require ATP funding of £108m. The Permanent Secretary eventually advised against implementation of the project, requesting a specific ministerial direction if there was to be expenditure on the project.¹⁸ Apparently, the Accounting Officer took the view that the project was 'an abuse of the aid programme in the terms that this is an uneconomic project' and that 'it was not a sound development project.'¹⁹ The Foreign Secretary (Douglas Hurd) nevertheless approved ATP support for the project, taking the view that withdrawal of the UK's offer would adversely affect the UK's credibility, and gave the required specific directive to the Permanent Secretary.²⁰ The Malaysian and UK governments subsequently signed a financial agreement for ATP support for the Pergau project. Work on the project began in July 1991, and by 31 March 1993, the ODA had spent £9.953m on the project from their ATP.²¹ The cost of the project to the UK would eventually rise to £234m.

The ODA's response to the 'surprise' of the Public Accounts Committee as to 'why no attempt was made to establish the reasons why the client was so keen to continue with the project, when alternatives were apparently available'²² was that they were 'well aware that the Malaysian Government was pursuing a policy of fuel diversification and wished to diversify further into hydro-electricity'. According to the ODA, Malaysia already had 'considerable experience with such sources and, having had severe teething problems with gas turbines in previous years, took the view that hydro-electric sources were a more reliable option, particularly for coping with peak loads'.²³

The WDM sought judicial review of the decisions to grant ATP funding and to continue payments to the project. The relevant statutory provision was the Overseas Development and Cooperation Act 1980 ('ODCA 1980') which provided in s.1(1) that

The Secretary of State shall have power, for the purpose of promoting the development or maintaining the economy of a country or territory outside the United Kingdom, or the welfare of its people, to furnish any person or body with assistance, whether financial, technical or of any other nature.

¹⁶ See Rose LJ [1995] 1 WLR, 391.

¹⁷ Lankester, 129.

¹⁸ The PAC considered that this request was 'right and in accordance with his responsibilities' (Cm2602, [9]).

¹⁹ Rose LJ, at 392.

²⁰ HC908, [56].

²¹ HC908, [44].

²² Cm2602, [10].

²³ Cm2602, [11].

It was held by the Divisional Court (Rose LJ and Scott Baker J) that the WDM had standing to bring the application and that the Secretary of State's decision to fund the project was not a lawful exercise of his powers under the Act.

While rightly described as 'a true high-water mark of judicial creativity prior to the HRA'²⁴, *Pergau Dam* was, in one sense, a straightforward judicial review case, engaging several issues that arise in such proceedings. WDM's standing was a major issue. The time limits imposed on applications for judicial review were engaged, although to a lesser extent. Availability of discovery in judicial review proceedings also arose as a minor point. The judgment itself turned on the correct construction of a statutory power – the meaning and scope of the power to grant overseas development aid. Questions of improper purposes and appropriate remedies also arose. However, underpinning the whole edifice were the notions of prudence²⁵ and value for money in the disposition of public revenues.

On time limits, the Court's view was that 'the general importance of the matter may itself be a reason for resolving the substantive issues, even where there has been delay'.²⁶ It was held that there was good reason for extending time, and that the delay in the case provided no basis in itself for refusing relief.²⁷ On the issue of discovery, Rose LJ noted²⁸ that 'general discovery is not available', and an application for discovery 'will be refused if discovery is not necessary for disposing of the case fairly'. Discovery was refused as not being necessary for fair disposition of the case. The court's decisions on propriety of purpose and standing are far more controversial, and will now be scrutinised.

THE ECONOMICS OF PURPOSE

It is a basic principle of administrative law that statutory powers conferred for one purpose may not be exercised for other purposes. Thus, in *R v Somerset CC ex parte Fewings*²⁹ the council could not use a statutory power to manage land 'for the benefit, improvement or development of their area' to ban deer hunting on its lands, on the basis that hunting was 'cruel'. The principles relating to improper purposes apply with no less rigour to public revenues. So, in *Sydney Municipal Council v Campbell*³⁰, a statutory power to acquire land required for widening, enlarging or extending public ways could not be used to acquire land to secure profits from projected increases in the value of the land. While it may be thought that the council was being prudent and entrepreneurial in seeking to enhance its revenues by sound investments, this was not the purpose of the statutory power. A similar attempt at unauthorised prudence was rejected in *Congreve v Home Office*,³¹ where the Home Secretary was prevented from using his licensing powers to revoke TV licences renewed early so as to make up a shortfall in licence fees.

Propriety of purpose was the main point raised by the WDM in respect of the legality of the decision of the Secretary of State in *Pergau Dam*. According to the WDM, the purpose of the powers conferred by s.1(1) of the ODCA 1980 was to promote development, and the test was whether the Secretary of

²⁴ R Rawlings, 'Modelling Judicial Review' (2008) 61(1) CLP 95, 101.

²⁵ In this chapter, 'prudence' is used to refer to *financial* prudence, rather than *political* prudence (on which, see John Snape, *The Political Economy of Corporation Tax* (Hart 2011)), 25-36.

²⁶ Rose LJ, at 402.

²⁷ Rose LJ, at 403. The court's approach in this respect seems to have been endorsed in *Hardy v Pembrokeshire CC* [2006] EWCA Civ 240, [2006] Env LR 28. See generally, A Samuels, 'Permission for Judicial Review Out of Time: An Overview' [2002] 7 JR 216.

²⁸ At 396 (followed in *Re Quark Fishing Ltd (Disclosure)* [2001] EWHC Admin 920).

²⁹ [1995] 1 WLR 1037 (CA).

³⁰ [1925] AC 338 (PC).

³¹ [1976] QB 629 (CA).

State decided to provide financial assistance to the Malaysian government for the purpose of promoting development. If aid was to be granted, projects had to be ‘sound development projects’. The evidence demonstrated that the Secretary of State’s decision was made in reliance upon ‘irrelevant facts and matters and in defiance of relevant considerations and advice’, particularly the view that the project was not ‘sound economic development’.³² The Secretary of State however claimed to have considered throughout the decision-making process that he was dealing with a ‘development project’ – one ‘whose purpose was to help Malaysia to carry out its plans for addressing its energy needs and thus promote the country’s economic development’. He confirmed that he ‘was aware that formal offers of financial support had already been made -- and renewed -- to the Malaysian Government, which clearly regarded this project as a key element of their programme for addressing their substantial power requirements’. He thus ‘took the view that the withdrawal of the offer to provide assistance would affect the United Kingdom’s credibility as a reliable friend and trading partner and have adverse and far-reaching consequences for our political and commercial relations with Malaysia’.³³

That the Secretary of State was entitled to take account of wider political and economic considerations was common ground between the parties, provided that there was a sufficient substantive power within the statute. Rose LJ accepted that ‘that the *weight* of competing factors’³⁴ was a matter for the Secretary of State, once there was a purpose within the statute. However, it was for the courts to ‘determine whether, on the evidence before the court, the particular conduct was, or was not, within the statutory purpose’. Arguments as to the dam’s ‘undoubted benefit’ in meeting the need for electricity were stated to ‘[beg] the question of whether there was a need for energy generated at substantially greater cost than by any other means’, and the Malaysian government’s determination to go ahead with the scheme did not advance the argument, since it was just ‘a necessary prerequisite for the granting of any overseas aid.’³⁵ According to Rose LJ, where the contemplated development is, on the evidence, ‘so economically unsound that there is no economic argument in favour of the case, it is not ... possible to draw any material distinction between questions of propriety and regularity on the one hand and questions of economy and efficiency of public expenditure on the other.’ Rose LJ accepted that the Secretary of State was, ‘generally speaking, fully entitled’ to take account of the relevant political, economic, commercial and diplomatic issues – as long as there was a ‘development purpose’ within the Act.³⁶ However, no such purpose within the statute existed at the relevant time, and thus the decision of the Secretary of State was ‘unlawful’. Scott Baker J also concluded that ‘there was nothing in aid terms to justify the use of public money for the Pergau project.’³⁷

Although courts have sometimes intervened in local government revenue dispositions on behalf of ratepayers³⁸, the court’s intervention in the manner wherein central government used public revenues was surprising. Prosser describes it as a ‘suggestion of greater judicial activism’.³⁹ The focus on ‘sound’ in the context of ‘economic development’ was momentous, enabling the court to make a somewhat far-fetched connection between the statutory words and a requirement for what essentially is a prudential management by central government of taxpayers’ money. Counsel for the Secretary of State had rightly highlighted that the word ‘sound’ was not in the statute. The response of Rose LJ

³² Rose LJ, [1995] 1 WLR, 399.

³³ See Rose LJ at 398-399.

³⁴ *Ibid* (emphasis supplied).

³⁵ At 402.

³⁶ *Ibid*.

³⁷ At 403.

³⁸ See eg, *Bromley London Borough Council v GLC* [1983] 1 AC 768 (HL); *Prescott v Birmingham Corp* [1955] Ch 210 (CA); *Roberts v Hopwood* [1925] AC 578 (HL). On the differences between ratepayers and taxpayers, see Lord Wilberforce in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 632-633 (HL).

³⁹ Tony Prosser, *The Economic Constitution* (Oxford 2014), 115.

that 'if Parliament had intended to confer a power to disburse money for unsound developmental purposes, it could have been expected to say so expressly'⁴⁰ is, with respect, unconvincing. It can equally be argued that, 'if Parliament had intended to impose a constraint of prudence on the grant of aid for developmental purposes, it could have been expected to say so expressly'. This constraint is simply a judicial gloss, and economics was probably no consideration in the conferment of the statutory power. However, Rose LJ felt 'comforted' in his approach by 'the way in which the successive ministers, guidelines, Governments and White Papers ... have, over the years and without exception, construed the power as relating to economically sound development'.⁴¹ But this comfort was arguably misplaced. The court was deciding a question of law on the correct interpretation of a statute, rather than a question on government policy. Interestingly, Lankester observed that at the core of the Pergau affair was the 'divergence of actual policy from officially stated policy'.⁴² But politicians having always taken a particular line as a matter of government policy has no bearing on what a statute means. It is doubtful that the court could have found such comfort, had 'successive ministers, guidelines, Governments and White Papers over the years and without exception' taken the line that the power could be used to support rebellions against authoritarian regimes. Had it been so desired, ministers could have sought amending legislation to put their stated policy on a statutory basis.

Interestingly, New Labour's International Development Act 2002 ('IDA 2002'), which replaced the ODCA 1980, addressed this issue specifically. Section 1(1) of the IDA 2002 empowers the Secretary of State to provide 'development assistance', which s.1(2) defines, *inter alia*, as assistance provided for the purpose of 'furthering sustainable development'. Crucially, 'sustainable development' is defined in s.1(3) to include 'any development that is, in the opinion of the Secretary of State, *prudent* having regard to the likelihood of its generating lasting benefits for the population of the country or countries in relation to which it is provided'.⁴³ It is likely, or, at least, possible, that inclusion of 'prudent' in s.1(3) is a direct consequence of *Pergau Dam*, which would support the view that prudence is a new requirement imposed by *Pergau Dam* itself. It may well be that a requirement for prudence or sound economics is appropriate when dealing with how governments spend taxpayers' money. Harden et. al. have stated that 'The *Pergau Dam* case makes clear that legality and value for money cannot be treated as entirely separate matters' and that the '*Pergau* principle requires spending to pass a threshold value for money test as a condition of legality'.⁴⁴ However, matters such as 'value for money' are arguably political, for which governments are accountable to Parliament and the electorate.

The impact of requirement for 'soundness' on propriety of purpose was also significant. Because the Pergau project was economically unsound, the decision to fund it was 'not for a development purpose'. Consequently, any other factor that the Secretary of State may have been entitled to consider in addition to a development purpose could not rightly have been triggered. The court's decision on improper purposes may possibly be supported on the narrow view that a power to grant aid provision for development purposes cannot be used to avoid embarrassment to the government. The difficulty with supporting *Pergau Dam* on this basis is that there was, in the minds of all concerned, both in the UK and Malaysia, a clear 'development purpose' – construction of a hydro-electric power plant to meet an existent need for extra electricity. What converted the project into a non-development purpose in the view of the court was the economics of using a dam. Had the ATP funding been granted for gas turbines instead of a dam, no one would have supposed that it was not for a development purpose. Thus, simple economics converted a purpose into a non-purpose. For a court to take this approach, and via a gloss on the statutory language, is problematic, especially seeing

⁴⁰ [1995] 1 WLR 386, 402.

⁴¹ *Ibid.*

⁴² Lankester, 5.

⁴³ Emphasis added.

⁴⁴ I Harden, 'Value for Money and Administrative Law' [1996] PL 661, 680.

that the question whether the project was indeed a ‘bad buy’ was contentious. For example, Dr Mahathir said that it was ‘stupid’ to so describe it. For Malaysia, it was an ‘excellent buy’, because they were receiving a grant of £234m million.⁴⁵ One could be forgiven for asking: ‘must the question whether aid is for a development purpose be evaluated from the perspective of the donor or the donee?’ The perspectives may well differ. A further question is whether this is an appropriate subject of judicial determinations.

Whether a statutory power is exercised for a particular purpose is a question of fact.⁴⁶ In both *Fewings* and *Campbell*, the evidence showed clearly that the relevant decision-makers did not advert their minds to the terms of the statutory powers that they were purporting to exercise. In *Pergau Dam*, the Secretary of State and all involved in advising him clearly did that. In each of *Fewings* and *Campbell*, there was only one purpose, which was not the permitted purpose. In *Pergau Dam*, it seems that there may have been more than one purpose. Clearly, the Secretary of State had wanted to avoid the embarrassment to the government that would arise from resiling from a clear undertaking given by a UK Prime Minister to a foreign Prime Minister, and it is clear that statutory powers cannot be exercised simply for the purpose of avoiding embarrassment to the government.⁴⁷ But it would be difficult to cast *Pergau Dam* in this light. The Secretary of State’s decision was the last in a long saga. Decisions to support the Pergau project had been taken long before the issue of embarrassment arose. The project was designed to fulfil a specific development need. The only problems related to the escalating costs of that project, and the feeling that there were cheaper ways of fulfilling the development need. The conclusion that the dam was uneconomic did not remove the need for electricity. Neither did the greater short-term cost effectiveness of gas turbines. It is significant that the focus of the economic arguments was short-term. A dam is likely to be more enduring than gas turbines, and a more long-term view (eg, 100 years) may render the case for one more attractive or more ‘sound’ in economic terms. So also may environmental sustainability. Indeed, the ODA, in response to a comment by the PAC, indicated its view that ‘The proposed aid was for a valid development project which would produce much needed peak time power in an environmentally friendly and sustainable way’.⁴⁸ This is just another way of saying that there are possible concerns other than short-term economic viability. This surely must be a matter for the Secretary of State. As Sumption noted in his FA Mann Lecture 2011;

The practical effect was to transfer to the court the discretionary powers of the Secretary of State on a matter of policy and the task of assessing the project’s merits. As it happens, Parliament’s view about the merits of the Foreign Secretary’s decision was different. It subsequently approved without demur a supplementary estimate in an appropriation bill, which reallocated the available funds so as to allow the payments to Malaysia to be made anyway, along with payments for two other projects which were thought to be open to the same objections.⁴⁹

Sumption considered that the decisions of the courts on the abuse of discretionary powers are often based ‘on a judgment about *what it is thought right for Parliament to wish to do*’⁵⁰, that such judgments are political, ‘dealing with matters (namely the merits of policy decisions) which in a democracy are the proper function of Parliament and of ministers answerable to Parliament and the

⁴⁵ See Lankester, 120.

⁴⁶ Lord Loreburn in *Clanricarde (Marquess) v Congested Districts Board* (1914) 79 JP 481 (HL); Duff J in *Sydney Municipal Council v Campbell* [1925] AC 338, 343 (PC).

⁴⁷ See eg, *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).

⁴⁸ Cm2602, [12].

⁴⁹ J Sumption, ‘Judicial and Political Decision-making: The Uncertain Boundary’ (2011) 16 JR 301, 306.

⁵⁰ At 307 (emphasis added).

electorate’.⁵¹ There is much force in these observations. Harlow also highlighted the ‘striking’ character of *Pergau Dam*, ‘because the department, through its Permanent Secretary, was accountable through the audit process to the Public Accounts Committee, while the minister was responsible to the House of Commons, where the matter was pursued actively.’⁵² Furthermore, for an exercise of power for one purpose to also permit another purpose to be achieved, is not necessarily fatal.⁵³ *UK Uncut Legal Action Ltd v Revenue and Customs Commissioners*⁵⁴ for example shows that, while avoidance of embarrassment is irrelevant, the court may sometimes excuse it – even in a case of public revenues foregone. The *Pergau* court arguably went too far.

BUSYBODY OR NOT?

The court’s decision on standing concretised a trend towards liberalisation of the standing rules. The following analysis explains how and why. It was noted earlier that the WDM had nothing to do with the Pergau project. So how could they possibly have standing? Section 31(3) of the Supreme Court Act⁵⁵ 1981 and Order 53 r.3(7) of the Rules of the Supreme Court provide that the High Court ‘shall not grant leave’ to make an application for judicial review unless the court ‘considers that the applicant has a sufficient interest in the matter to which the application relates’. The phrase ‘sufficient interest’ was selected ‘as one which could sufficiently embrace all classes of those who might apply, and yet permit sufficient flexibility in any particular case to determine whether or not “sufficient interest” was in fact shown.’⁵⁶ In *R v Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators’ Association*⁵⁷ Lord Denning MR said in respect of the requirement that a ‘person aggrieved’ could apply for certain prerogative orders that the term included a ‘person whose interests may be prejudicially affected by what is taking place’. He also noted that the term ‘does not include a mere busybody who is interfering in things which do not concern him; but it includes any person who has a genuine grievance because something has been done or may be done which affects him’.

The difficulty in standing cases is how to distinguish between a ‘mere busybody’ and someone with a ‘genuine grievance’. Clearly, ‘[n]ot every member of the public can complain of every breach of statutory duty by a person empowered to come to a decision by that statute’,⁵⁸ and, ‘[m]erely to assert that one has an interest does not give one an interest’.⁵⁹ If an applicant ‘has no interest whatsoever’, then the application for leave will be refused.⁶⁰ To ‘have no interest whatsoever’, was later taken by Sedley J in *R v Somerset CC Ex parte Dixon*⁶¹ as meaning ‘to interfere in something with which one has no legitimate concern at all’. The threshold at the leave stage is set ‘only at the height necessary to prevent abuse’.⁶² In other cases, ‘the question of sufficient interest cannot ... be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule

⁵¹ Ibid.

⁵² C Harlow, ‘Public Law and Popular Justice’ (2002) 65 MLR 1, 5.

⁵³ See eg, *Westminster Corporation v London and North West Railway Co.* [1905] AC 426 (HL).

⁵⁴ [2013] EWHC 1283 (Admin), [2013] STC 2357.

⁵⁵ Now restyled the Senior Courts Act.

⁵⁶ Lord Roskill in *National Federation* [1982] AC 617, 658.

⁵⁷ [1972] 2 QB 299, 309.

⁵⁸ Schiemann J in *R v Secretary of State for the Environment, Ex parte Rose Theatre Trust Co.* [1990] 1 QB 504, 520. See also Dove J in *Wylde v Waverley BC* [2017] EWHC 466 (Admin), [20]; Lord Reed JSC in *Walton v Scottish Ministers* [2012] UKSC 44, [2013] 1 CMLR 28, [94].

⁵⁹ Schiemann J in *Rose Theatre* [1990] 1 QB 504, 520.

⁶⁰ Sir John Donaldson MR in *R v Monopolies and Mergers Commission, ex p Argyll Group plc* [1986] 1 WLR 763, 773 (CA).

⁶¹ [1998] Env LR 111, 116-117 (QB).

⁶² Ibid.

requires sufficient interest in the matter to which the application relates.’⁶³ In other words, ‘the question of locus is considered in the context of the issues raised’.⁶⁴ This means that if the application ‘appears to be otherwise arguable and there is no other discretionary bar’, leave to apply will be granted. The test of interest or standing will then ‘be re-applied as a matter of discretion on the hearing of the substantive application’.⁶⁵

Even where the applicant can show an interest, ‘mere interest alone in the matter in issue or the decision in question is not enough’.⁶⁶ The strength of the applicant’s interest is one of the factors to be weighed in the balance,⁶⁷ and that interest must be ‘sufficient’. In *Arsenal Football Club Ltd v Smith (Valuation Officer)*⁶⁸ for example, Lord Wilberforce held that, although the applicant was a taxpayer, his ‘interest’ was, in respect of his proposal for an alteration in the valuation list as regards Arsenal’s hereditament, ‘too remote’. These principles are clear enough – but where does one draw the lines of demarcation? The issue is compounded where the claimant for standing is an association of persons, a public interest or pressure group, etc, such as the WDM.⁶⁹ *National Federation* decided that one taxpayer usually has no sufficient interest to ask the court to investigate the tax affairs of another taxpayer.⁷⁰ This has implications for a body representing a group of applicants. According to Lord Wilberforce, ‘an aggregate of individuals each of whom has no interest cannot of itself have an interest’.⁷¹ A similar approach can be seen in *Rose Theatre*⁷² where two of Schiemann J’s ‘propositions’, which he felt were ‘not inconsistent’ with *National Federation*, were;

The fact that some thousands of people join together and assert that they have an interest does not create an interest if the individuals did not have an interest ... The fact that those without an interest incorporate themselves and give the company in its memorandum power to pursue a particular object does not give the company an interest.⁷³

So, if no individual has standing, neither does a group of individuals. This naturally raises questions (addressed in *Pergau Dam*) as to situations wherein nobody would have a sufficient interest, resulting in unlawful governmental actions being unchallengeable. While Schiemann J recognised the force of the counsel’s concerns about this in *Rose Theatre*, his response was that;

The answer to it is that the law does not see it as the function of the courts to be there for every individual who is interested in having the legality of an administrative action litigated. Parliament could have given such a wide right of access to the court but it has not done so.⁷⁴

Rose Theatre is not without its critics. Otton J declined to follow it in *R v Inspectorate of Pollution and another, ex parte Greenpeace Ltd (No 2)*.⁷⁵ Sedley J in *Ex Parte Dixon*⁷⁶ also declined to follow

⁶³ Lord Wilberforce in *National Federation* [1982] AC 617, 630.

⁶⁴ *Ex Parte Dixon*, at 115.

⁶⁵ Sir John Donaldson MR in *Argyll Group plc* [1986] 1 WLR 763, 773.

⁶⁶ Dove J in *Wylde v Waverley BC* [2017] EWHC 466 (Admin), [20].

⁶⁷ Sir John Donaldson MR in *Argyll Group plc* [1986] 1 WLR 763, 773.

⁶⁸ [1979] AC 1, 14 (HL).

⁶⁹ See generally, N Fleming, ‘The Contribution of Public Interest Litigation to the Jurisprudence of JR’ [1998] 3 JR 63.

⁷⁰ Note that a taxpayer can sometimes have standing in respect of the Revenue’s treatment of other taxpayers – when complaining not *qua* taxpayer but *qua* competitor. See *R v Attorney-General Ex p. ICI Plc* [1987] 1 CMLR 72 (CA).

⁷¹ [1982] AC 617, 633.

⁷² [1990] 1 QB 504.

⁷³ At 520.

⁷⁴ At 522.

⁷⁵ [1994] 4 All ER 329.

parts of it. *Pergau Dam* was highly influential to Sedley J's approach, for he emphasised⁷⁷ that it affirmed a 'strong line of modern authority', and restored a 'powerful line of older authority' on standing. While not dissenting 'from any of the eight numbered propositions set out by Schiemann J', Sedley J disagreed with (as not being 'universally true')⁷⁸ the proposition of Schiemann J that the court will decide whether statute gives the complainant 'expressly or impliedly a greater right or expectation than any other citizen of this country to have [the challenged] decision taken lawfully.' According to Sedley J;

... the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power. If an arguable case of such misuse can be made out on an application for leave, the court's only concern is to ensure that it is not being done for an ill motive. It is if, on a substantive hearing, the abuse of power is made out that everything relevant to the applicant's standing will be weighed up, whether with regard to the grant or simply to the form of relief.⁷⁹

So the answer to the question 'is a public interest litigant a mere busybody?' seems to be that 'it depends'. In the *Greenpeace* case Greenpeace was held to have standing to apply for judicial review of a governmental decision to grant variations of authorisations to discharge radioactive waste from British Nuclear Fuel's Sellafield site in Cumbria. In Otton J's view, Greenpeace was not a 'mere' or 'meddlesome' busybody, but was an 'eminently respectable and responsible and its genuine interest in the issues raised is sufficient for it to be granted locus standi'.⁸⁰ Otton J referred to Lord Roskill's approval in *National Federation*⁸¹, of the view that whether an applicant has sufficient interest is a mixed question of fact and law. Thus Otton J said that it 'must not be assumed that Greenpeace (or any other interest group) will automatically be afforded standing in any subsequent application for judicial review in whatever field it (and its members) may have an interest'. The issue must be 'considered on a case by case basis at the leave stage and if the threshold is crossed again at the substantive hearing as a matter of discretion'.⁸² He had this consideration in mind in declining to follow Schiemann J in *Rose Theatre*. While Greenpeace was thus permitted to bring the application on behalf of its members, its application was denied on the merits.

In *R v Her Majesty's Treasury, Ex Parte Smedley*⁸³ the applicant, in his capacity as a taxpayer and elector, had standing to challenge the Treasury's expressed intention to pay the EU a sum in excess of £121.5 million out of the Consolidated Fund, seeking authorisation from Parliament via an Order in Council, rather than via statute. Slade LJ had little doubt 'that Mr. Smedley, if only in his capacity as a taxpayer, has sufficient locus standi to raise this question by way of an application for judicial review'.⁸⁴ Nevertheless, his application failed on the merits. Finally, in *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg*,⁸⁵ a member of the House of Lords with a keen interest in constitutional issues, had standing to challenge the decision of the Foreign Secretary to ratify the Maastricht Treaty. Again, he lost on the merits.

⁷⁶ [1998] Env LR 111, 117.

⁷⁷ At 121.

⁷⁸ At 118.

⁷⁹ At 121.

⁸⁰ [1994] 4 All ER 329, 351.

⁸¹ [1982] AC 617, 659. Compare Lord Wilberforce (at 631), Lord Scarman (at 653).

⁸² [1994] 4 All ER 329, 351.

⁸³ [1985] QB 657.

⁸⁴ *Ibid.*

⁸⁵ [1994] QB 552.

In the last three cases the applications were denied on the merits, raising the question why the applicants had standing to bring the applications in the first place. Were the courts just being ‘nosy’, or was there something deeper at play? As has been indicated, the Divisional Court also held in *Pergau Dam* that the WDM had the required standing. While Rose LJ accepted⁸⁶ that standing goes to jurisdiction, he also held that ‘the merits of the challenge are an important, if not dominant, factor when considering standing’.⁸⁷ He referred with approval to Wade’s view that ‘the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are involved’. There were also a number of ‘factors of significance’ in the case - the importance of ‘vindicating the rule of law’, the importance of the issue raised, the likely absence of any other responsible challenger, the nature of the breach of duty against which relief is sought, and the prominent role of the applicants in giving advice, guidance and assistance with regard to aid.

With respect to the last factor, Rose LJ considered arguments relating to the nature and role of the WDM.⁸⁸ It was ‘a non-partisan pressure group’, with an ‘associated charity which receives financial support from all the main United Kingdom development charities, the churches, the European Community and a range of other trusts’. Its council had cross-political party membership, including one MP from each of the three main political parties. It had 200 local groups whose supporters actively campaigned ‘through letter writing, lobbying and other democratic means to improve the quantity and quality of British aid to other countries’. Among other things, it was also involved in making written and oral submissions to select committees in both Houses of Parliament, had official consultative status with UNESCO, promoted international conferences, and brought together development groups with the OECD. Finally,

Its supporters have a direct interest in ensuring that funds furnished by the United Kingdom are used for genuine purposes, and it seeks to ensure that disbursement of aid budgets is made where that aid is most needed. It seeks, by this application, to represent the interests of people in developing countries who might benefit from funds which otherwise might go elsewhere.⁸⁹

The last statement is interesting on account of the question posed earlier as to which civilised society is one’s tax paying for. One might wonder why should a UK court permit anyone to represent the interests of an amorphous group of ‘people in developing countries’. This may well encourage ‘busybodies’. The rest of the excerpt is equally contestable. Why should a pressure group have standing regarding how HM Government spends public revenues? Who determines where ‘aid is most needed’? Ministers? Courts? The WDM? Why should the WDM have any legitimate interest in this decision? Does it have a similar interest in other central government spending decisions? If not, what is different about this case? These important questions require addressing.

The WDM’s argument was that, if they had no standing, nobody would ensure that powers under the Act are exercised lawfully. Rose LJ felt that all the relevant factors indicated that the WDM had a sufficient interest. In his view, if the Divisional Court in *Ex Parte Rees-Mogg* ‘was able to accept that the applicant in that case had standing in the light of his “sincere concerns for constitutional issues,” a fortiori, it seems ... that the present applicants, with the national and international expertise and interest in promoting and protecting aid to underdeveloped nations, should have standing in the present application’.⁹⁰ With respect, this does not necessarily follow. The issue of standing does not seem to have been contested in *Rees-Mogg*, and Lord Rees-Mogg was a member of the House of Lords. It is not clear that the court would have been so sanguine had Lord Rees-Mogg just been a random ‘man on the Clapham omnibus’.

⁸⁶ [1995] 1 WLR 386, 395.

⁸⁷ *Ibid.*

⁸⁸ At 392-393.

⁸⁹ At 393.

⁹⁰ At 396.

Nevertheless, the broad approach to standing seems well established now, thanks in part to *Pergau Dam*.⁹¹ For example, *Pergau Dam* was referred to with apparent approval by the Court of Appeal in *R (Corner House Research) v Secretary of State for Trade and Industry*⁹² and was followed in *Re McBride's Application for Judicial Review*⁹³ where Kerr J⁹⁴ specifically adopted the reasoning in *Pergau Dam*. Sedley J's endorsement of *Pergau Dam* in *Ex Parte Dixon* has already been noted.⁹⁵ In *Walton v Scottish Ministers*⁹⁶ Lord Reed said that it will be necessary in many contexts 'for a person to demonstrate some particular interest in order to demonstrate that he is not a mere busybody'. However, 'there may also be cases in which any individual, simply as a citizen, will have sufficient interest to bring a public authority's violation of the law to the attention of the court, without having to demonstrate any greater impact upon himself than upon other members of the public'.⁹⁷

Notwithstanding general acceptance, the broad approach espoused in *Pergau Dam* is problematic.⁹⁸ The WDM was neither a taxpayer nor a ratepayer. But should the inclusion of MPs from the three main political parties in its council be significant? Rightly, nothing much was made of this in the judgment. Neither it nor its UK supporters could possibly be affected by a decision to grant overseas aid out of moneys already allocated for overseas aid. This distinguishes it from *Rees-Mogg* and *Greenpeace*. That government ministers may have acted inappropriately should arguably have no impact on standing. That nobody else would otherwise have standing should have no impact on whether one has standing. It would simply mean that there is a situation that is not covered by statute. This is nothing new, and, if considered a problem, the solution is amending legislation. The desire to 'vindicate the rule of law' by permitting egregious governmental action to be brought to the attention of the courts is laudable. However, excessive widening of the standing rules may not be the answer. The words of Schiemann J in *Rose Theatre*⁹⁹ are pertinent. The irony is that, in attempting to uphold the rule of law by relaxing the standing rules, the courts may be in danger of achieving the opposite. Lord Simon of Glaisdale rightly noted in *Ransom v Higgs* that 'for the courts to try and stretch the law to meet hard cases ... is not merely to make bad law but to run the risk of subverting the rule of law itself'.¹⁰⁰

If the WDM had standing, so did anyone else in the country. This follows logically. But it cannot be right that everybody in the country has standing to challenge governmental action that affects nobody in the country. The difficulties with the *Pergau Dam* approach appear from *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform*¹⁰¹ where the Competition Appeal Tribunal decided that the applicants had standing, despite taking the view that their claim to standing was borderline, that they had adduced no real evidence of their standing other than to assert that they have a generalised consumer interest in UK banking, that they had 'certainly failed to establish any specific concern that differentiates them from the general body of consumers of banking services',

⁹¹ See eg, *R (Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370, [2002] All ER (D) 114 (Oct); *R (Hammerton) v London Underground* [2002] EWHC 2307 (Admin), [2002] All ER (D) 141 (Nov).

⁹² [2005] EWCA Civ 192, [2005] 1 WLR 2600.

⁹³ [1999] NI 299 (QB-NI).

⁹⁴ At 311.

⁹⁵ [1998] Env LR 111, 121.

⁹⁶ [2012] UKSC 44, [94].

⁹⁷ *Ibid.*

⁹⁸ Contrast A Tomkins, 'Judges Dam(n) the Government', (1996-1997) 7 KCLJ 91; A Cygan, 'Protecting the Interests of Civil Society in Community Decision-Making-The Limits of Article 230 EC' (2003) 52 ICLQ 995.

⁹⁹ Above, n 91 and text.

¹⁰⁰ [1974] 1 WLR 1594, 1617 (HL).

¹⁰¹ [2008] CAT 36, 2009 SLT 10.

and that their challenge to the lawfulness of the decision had ‘no legal merit’.¹⁰² Yet the Tribunal felt that the circumstances of the case were ‘wholly exceptional’, and ‘particularly in view of the specific interest and strong feeling’ which was aroused in Scotland.¹⁰³ According to the Tribunal¹⁰⁴;

We considered whether the fact that the application has, on examination, no legal merit should tip the balance the other way. We would certainly not wish to encourage unmeritorious and last minute applications of this kind. In the end, and with some hesitation, we have come to the conclusion that the wholly exceptional factors to which we have referred are decisive.

Harlow rightly pointed out that the test applied in *Pergau Dam*, ‘like the *Federation* case, noticeably shifts the centre of attention from the applicant to the merits of the cause (in technical terminology, from standing to justiciability).’¹⁰⁵ Thus the decision was no longer really about sufficiency of interest, but about something else. This feels like ‘mission creep’. *Merger Action Group* seems to have gone beyond even this. If Wade’s view (approved by Rose LJ in *Pergau Dam*) that ‘the real question is whether the applicant can show some substantial default or abuse’ is correct, then standing should have been denied. But, here, Scottish ‘strong feelings’ seemed to have played a significant role, thus embracing considerations additional to ‘the applicant’ and ‘justiciability’ mentioned by Harlow.

POLITICAL AND DIPLOMATIC DRAMAS

Interestingly, one of the most important issues relating to *Pergau Dam* did not feature in the court case. This is the tying of overseas aid to trade - specifically, arms deals. Unsurprisingly, this issue was picked up outside of the confines of the court case. As one commentator put it;

Essentially, Pergau dam was about the British government’s engagement in an aid-for-arms deal with the government of Malaysia, with the agreement that 20 percent of an arms sale from Britain to Malaysia be spent on the construction of a dam to provide electricity.¹⁰⁶

Lustgarten referred to the ‘great damage’ that was done to ‘the integrity of our overseas aid programme, and of the procedures for scrutiny of financial propriety within a major department of government’.¹⁰⁷ He sought to explain why the government had ‘so relentlessly insist[ed] on proceeding with a project whose cost had risen in a short period more than 25% over the original estimate’. The explanation was that;

Underpinning the whole tawdry episode was the fact that arms sales had been part of the original deal, as both sides fully understood. But no one in government was prepared to admit this so-called ‘linkage’ publicly, nor were they willing to forego the benefits. Hence they resorted to presenting to the public what is immediately recognisable to those who followed the Scott Inquiry as ‘half the picture’ - in accordance with the view of a former ambassador who insisted in his testimony that ‘half a picture can be accurate’.¹⁰⁸

¹⁰² At [45]-[46].

¹⁰³ At [47].

¹⁰⁴ At [48].

¹⁰⁵ C Harlow, ‘Public Law and Popular Justice’ (2002) 65 MLR 1, 6.

¹⁰⁶ E Seyedsayamdost, ‘Development as End of Poverty: Reform or Reinvention?’ (2015) 21 Global Governance 515, 528-529.

¹⁰⁷ L Lustgarten, ‘The Arms Trade and the Constitution: Beyond the Scott Report’ (1998) 61 MLR 499, 507.

¹⁰⁸ Ibid (citation omitted).

While some have referred to allegations of corruption in Malaysia (discussed below), the UK corruption angle has been thus described;

In Britain, the ‘arms for aid’ issue, also known as the Pergau Dam affair, surfaced in 1994 involving giving monetary aid to developing countries by Britain in return for arms deals. It also revealed the undisclosed fact that the Conservative Government had allocated business deals to British companies, namely Balfour Beatty and Cementation, which contributed heavily to the Conservative Party funds.¹⁰⁹

The connection of defence contracts to the Pergau project came early, with a ‘Protocol on Malaysia Defence Procurement Programme’ (paving the way for a Memorandum of Understanding on defence sales of £1 billion) being signed in March 1988 by the UK Defence Secretary and his Malaysian counterpart.¹¹⁰ There was apparently ‘a willingness on the part of the UK government to consider the possibility of providing aid for civil projects as part of the deal’.¹¹¹ As the Pergau dam saga developed, the link between the project and defence sales was more strongly made in the interactions between Mrs Thatcher and Dr Mahathir.¹¹² Unsurprisingly, there was much to say in Parliament about the matter. The linkage of aid to arms sales was a particular point of trouble. It was still being referred to in Parliament as lately as 2012, with Chris Leslie saying that the Pergau affair ‘involved a too-close relationship between the aid being given to a foreign country and the trade that was taking place, particularly in relation to arms exports’.¹¹³ It is not difficult to imagine the tone of the contributions from the government and opposition benches. I will restrict my coverage of Parliamentary debates to the Lords on 17 November 1994¹¹⁴, in the wake of the decision of the Divisional Court. Baroness Blackstone described as ‘entirely unacceptable’ the situation wherein ‘scarce funding set aside for aid and development purposes [was] used, as happened in the case of the Pergau dam, to lubricate arms deals’.¹¹⁵ Lord Cledwyn of Penrhos claimed that ‘the Pergau dam affair’ was ‘a classic example of how foreign affairs should not be conducted’.¹¹⁶ In his view, ‘Such unscrupulous manipulation of the aid budget was ... a disgrace’.¹¹⁷ The Bishop of Worcester made a plea that aid be kept strictly separate from arms deals, and requested confirmation as to whether ‘that particular deal ended in a 400 per cent. payback in defence contracts’, since a Foreign Office spokesman ‘was reported as saying that we give aid and sell arms but there is no connection between the two’.¹¹⁸

In what seemed like a classic case of denial, Lord Henley, Parliamentary Under-Secretary of State at the Ministry of Defence, said;

[T]here is quite simply no link between aid projects and defence contracts in Indonesia, Jordan, Oman or in any other markets which noble Lords care to mention. Allegations of that sort are quite simply untrue. They are based on spurious correlations between provisions of aid and arms sales. I totally reject the allegations ... on this issue that our aid projects are linked in any way to arms sales.¹¹⁹

¹⁰⁹ YK Teh, ‘The Future Fraud and Corruption Scenario in Developing and Developed Countries’ (1997) 5(1) *Journal of Financial Crime* 58, 59.

¹¹⁰ Lankester, 54.

¹¹¹ *Ibid.*

¹¹² Lankester, 72-73.

¹¹³ HC Deb 15 October 2012 vol 551, cc85-86.

¹¹⁴ HL Deb 17 November 1994 vol 559, cc26-140.

¹¹⁵ Column 34.

¹¹⁶ Column 48.

¹¹⁷ Column 49.

¹¹⁸ Column 56.

¹¹⁹ Column 136.

For her part, Baroness Chalker, Minister of State at the Foreign and Commonwealth Office said in respect of the judgment;

The Foreign Secretary and I stand by the evidence which we gave to the Select Committee. The Select Committee inquiry went wider than the court judgment. It examined the events of 1988 and the political and commercial background. The court did none of that. The court was not asked to enter, and did not enter, into the question of arms sales. I understand that the judgment has nothing to say on that point.¹²⁰

It is not clear what point Baroness Chalker was making in noting that the court did not go into the political and commercial background and did not enter into the question of arm sales. More interesting was her statement that;

The Pergau project is now 75 per cent. complete and involves over 200 British companies. The judgment does not affect this Government's contractual obligations towards the banks financing the project. What it would mean ... is that the project should not henceforth be financed from funds voted under the Overseas Development and Cooperation Act 1980.¹²¹

While the last statement might delight those interested mainly in the overseas aid budget being used for 'legitimate' purposes, its implication is that, far from securing that taxpayers' money is used in a financially prudent manner, all that would happen is that the government would fund the Pergau project from other funds, the cost to the taxpayer remaining the same. Thus, prudential management of overseas aid funds does not necessarily equate to such management of general public revenues.

Another fallout of *Pergau Dam* related to damaged relations with Malaysia. Negative coverage from the British press, in particular, apparently unsubstantiated allegations of bribery in the *Sunday Times* in February 1994 against Dr Mahathir 'infuriated' Dr Mahathir.¹²² The furore ultimately resulted in a 'sweeping trade ban on Britain',¹²³ which took the form Malaysia's 'boycott of British companies for new public sector contracts'.¹²⁴ A February 1994 official statement from the Malaysian Finance Minister demonstrated the feelings of outrage. The statement read;

The British media may have their own political agenda but we detest their patronising attitude and innuendoes that the government of developing countries, particularly a Muslim-led nation like Malaysia, are incompetent and their leaders corrupt.¹²⁵

The Minister thought that the allegations were 'racially motivated and that the British press in general implied that doing business with "brown Muslims" inevitably involved bribery.'¹²⁶ British-Malaysia relations suffered a setback, and British exporters were apparently 'furious', with some urging the government to intervene with *The Sunday Times* to ask them to retract.¹²⁷ Fortunately, the trade boycott was lifted in November 1994 after some mediation.¹²⁸

¹²⁰ Column 29.

¹²¹ Column 30.

¹²² Lankester, 119, 139.

¹²³ See eg, Rhys Williams, "Pergau Dam Affair: 'Sweeteners' row sparked trade ban", *The Independent*, 7 September 1994 (available online at: <https://www.independent.co.uk/news/uk/pergau-dam-affair-sweeteners-row-sparked-trade-ban-sunday-times-story-linking-malaysias-prime-1447388.html> - accessed 5 September 2017).

¹²⁴ Lankester, 120.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ Lankester, 121.

WHITHER OVERSEAS AID?

Lankester noted that the Pergau saga ‘had a lasting effect on all who were concerned with British aid policy¹²⁹ and became ‘a turning point when British aid moved away from being so closely geared to British commercial interests and moved towards becoming today possibly the most highly respected amongst all donors with a much strengthened focus on poverty alleviation’.¹³⁰ The Divisional Court’s judgment naturally led to government review of overseas aid. Baroness Chalker announced in the House of Lords that ‘we have asked our officials to review carefully all the projects and activities they fund to see whether there are any others approved under our previous understanding of the Overseas Development and Cooperation Act 1980 which may also fall outside the interpretation of the Act given for the first time last week.’¹³¹

Lankester referred to beneficial impact on aid of the lessons learnt from Pergau, to ‘international moves to reduce the tying of aid’, and to ‘the election of a Labour government in 1997 with a mandate to increase the aid budget and strengthen aid effectiveness’.¹³² These factors combined to ‘bring about changes in British aid policy that gave greater weight to development and poverty alleviation and in due course all but eliminated the commercial influence in aid decisions’.¹³³ With respect to the aforesaid ‘international moves’, member states of the OECD had adopted in December 1991, the ‘Helsinki rules on tied aid credits aimed at limiting the use of concessional financing for projects that should be able to support commercial financing (ie, those which are “commercially viable”)’.¹³⁴ The OECD’s Development Assistance Committee further recommended in May 2001 that aid to the least developed countries be untied.¹³⁵ With respect to the new 1997 Labour administration, the new Labour minister for overseas development, Clare Short, presided over a renamed Department for International Development. It seems that one of her first acts was to abolish ATP.¹³⁶ But her tenure also witnessed a substantial increase in the aid budget. One development under her leadership was the IDA 2002, which has been referred to earlier. The new focus on poverty reduction was firmly declared in s.1(1) – ‘The Secretary of State may provide any person or body with development assistance if he is satisfied that the provision of the assistance is likely to contribute to a reduction in poverty.’ This represented a major shift in the UK’s aid legislation, and may well constitute the enduring legacy of *Pergau Dam*. The shift in focus is welcome, as is the enshrinement in statute of a requirement for ‘prudence’ in aid provision. But does any of this strengthen the hands of the courts in their scrutiny of the disbursement of taxpayer revenues? Some commentators think not. McAuslan thus reflected on the IDA 2002;

The extent of the discretion conferred upon the Secretary of State may be seen by a closer examination of section 1 of the Act. Development assistance may be provided if the Secretary of State *is satisfied* that its provision *is likely to contribute to a reduction in poverty*. That is a

¹²⁹ Lankester, 4.

¹³⁰ Lankester, 141.

¹³¹ HL Deb 17 November 1994 vol 559, c30.

¹³² Lankester, 4.

¹³³ Ibid.

¹³⁴ See OECD, *Arrangement on Officially Supported Export Credits: Ex Ante Guidance for Tied Aid* (2005 Revision, p2; available online at [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=td/pg\(2005\)20&doclanguage=en](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=td/pg(2005)20&doclanguage=en) (accessed 5 September 2017). See generally KP Rosefsky, ‘Tied Aid Credits and the New OECD Agreement’ [1993] 14(3) UPaJIBL 437-467.

¹³⁵ See the OECD Policy Brief ‘Untying Aid to the Least Developed Countries’, July 2001, p1 (updated in July 2008). See also OECD’s Paris Declaration on Aid Effectiveness 2005.

¹³⁶ Lankester, 20.

subjective test. The Act does however go on to elaborate what development assistance means which might be thought to operate to limit the Secretary of State's discretion. Development assistance means "assistance provided for furthering sustainable development". "Sustainable development" in turn *includes* "any development that is, *in the opinion of the Secretary of State*, prudent having regard to the likelihood of its generating lasting benefits for the population of the country or countries to which it is provided." Like a dam? A nuclear power station? A state-of-the-art air traffic control system? A striking new building to house a country's Supreme Court? If all that has to be shown is the reasonableness of the Secretary of State's opinion that such development is "prudent" having regard to the "likelihood" of its generating lasting benefits to the population, then the draftsman will have gone a long way to overcome the *Pergau Dam* case.¹³⁷

Thus did Parliament reassert itself to unravel *Pergau Dam's* intrusion into matters of government policy.

Given the controversial nature of the Divisional Court's decision, the embarrassment that it caused the government, and the subsequent reassertion of itself by Parliament, the question is why the government did not appeal. There are difficulties with the Divisional Court's decisions and reasoning on the main issues in the case. While the broad approach to standing is settled, it was arguably taken too far in *Pergau Dam*. But it is likely that an appeal on standing would have failed. Illegality is quite different however. It is this writer's view that the Divisional Court's decision was wrong, and that there would have been a reasonable chance of a successful appeal. Perhaps Parliamentary action was considered more predictable and prudent than appealing.

CONCLUSION

R v Secretary of State for Foreign Affairs, ex parte World Development Movement Ltd is truly a landmark case. Its lasting impact, mostly controversial, and mostly possibly undesirable, can be thus summarised. It extended the broad approach to standing, such that one can apparently have standing to protect the interests of indeterminate persons in foreign lands. It represented increased judicial interventionism in the deployment of public revenues, postulating that the disposition of tax revenues by central government is an appropriate matter for judicial determination. It expanded the concept of improper purpose, via a gloss on statutory powers, to require financial prudence in the management of central government revenues. The outcome of all this was that a pressure group with a tenuous claim to standing succeeded in derailing targeted central government spending. Finally, it resulted in the deprecation of tying aid to trade, and in overseas aid being focused on poverty reduction.

¹³⁷ P McAuslan, 'The International Development Act, 2002: Benign Imperialism or a Missed Opportunity?' (2003) 66 MLR 563, 583.