Case law

Japan

Update on lawsuits related to the government responsibility following the Fukushima Daiichi nuclear power plant accident

As previously reported,[1] various lawsuits related to the Fukushima Daiichi nuclear power plant (NPP) accident (hereinafter referred to as "the Fukushima accident") have been filed in Japan. The plaintiffs in these lawsuits sometimes claim that the government has responsibility for failing to exercise regulatory authority over Tokyo Electric Power Company (TEPCO), in addition to the liability of TEPCO itself. As of August 2019, decisions regarding whether the government was liable in the Fukushima accident have been rendered in nine cases. In six of these cases, the courts found that TEPCO and the government were liable and ordered both to pay damages. Conversely, in three decisions, the courts found that TEPCO was liable, but not the government.

In analysing the cases, the courts identified the cause of the Fukushima accident as a station blackout, which was caused by the tsunami, not the earthquake. On that basis, the courts determined government responsibility by analysing the following three questions (though there are slight differences among individual decisions):

1. whether tsunami measures were within the government's regulatory authority;
2. whether the tsunami was foreseeable; and
3. whether the duty to prevent the consequences of the tsunami was breached, which is determined based on whether the accident could have been prevented if the regulatory authority had been exercised, and whether there were any other means of preventing the accident other than by exercising the regulatory authority.

On these issues, all of the court decisions found in the affirmative on the first two questions. That is, the courts stated that the government had the regulatory authority and that the accident was foreseeable (although the decisions varied slightly on their findings regarding the laws that formed the basis for the regulatory authority and regarding the time at which the accident became foreseeable). For this reason, these decisions are considered to be establishing court practice. Accordingly, the finding of government responsibility for failing to exercise the regulatory authority comes down to the third question.

The latest decision rendered in the state redress claim litigation relating to the Fukushima accident is the Nagoya District Court decision.

Nagoya District Court decision (2 August 2019)

The plaintiffs, who claim to have been forced to evacuate and to have suffered mental anguish due to the Fukushima accident, filed a lawsuit seeking a total of JPY 1.44 billion in damages against the government and TEPCO. The court allowed part of the claim

1. NEA (2018), "District court decisions on lawsuits related to state liability following the Fukushima Daiichi nuclear power plant accident", *Nuclear Law Bulletin*, No. 100, OECD, Paris, pp. 87-89.

against TEPCO but denied the government responsibility. The plaintiffs and TEPCO both appealed.

In determining whether the government was responsible, the court analysed the three questions discussed above: whether the government had the regulatory authority; whether the tsunami was foreseeable; and whether the accident could have been prevented if the regulatory authority had been exercised.

- (1) Whether the government had the regulatory authority

The court found that the government had the regulatory authority as claimed by the plaintiffs. That is, the government had the authority to order TEPCO to enact protective measures, such as installing double doors at the entrances and exits of the turbine building, and installing a waterproof housing to protect the seawater pumps installed to cool the emergency diesel generator in the event of a tsunami.

- (2) Whether the tsunami was foreseeable

First, the earthquake prediction published by a government agency in 2002 was not at a level at which a consensus among expert researchers could be reached; however, it at least had a scientific foundation and had a certain degree of reliability. Considering the serious damage that can result from a severe accident at an NPP, requiring knowledge at a level wherein a consensus on foreseeability can be reached might mean ignoring serious risks to citizens' lives and health. Accordingly, the government needed to take the government agency's earthquake prediction into consideration when adopting protective measures against tsunamis at the Fukushima Daiichi NPP.

Second, the government and TEPCO were aware of research in 2006 by a study group comprised of regulatory agencies, TEPCO, and other nuclear operators, among other organisations, which identified the possibility of a station blackout in the event of a tsunami that exceeded the seawalls at the site. Accordingly, at this point, at the very latest, the government had the duty to have TEPCO calculate the potential impact of an expected tsunami, on the basis of the earthquake prediction made by the government agency. Given the science of tsunami assessment as of 2006, it was possible for the government to foresee that a tsunami exceeding the seawalls at the site could occur.

As a general matter, however, foreseeability does not immediately give rise to a duty to prevent the consequence, and the required level of this duty differs based on the degree of foreseeability. In this circumstance, the earthquake prediction by the government agency cannot be considered knowledge that is well enough established as a consensus held by experts, given the limited amount of past earthquake data on which it was based and the insufficiency of its scientific foundation. Moreover, even the government agency that published the prediction itself had described the reliability of the assessment of the areas where earthquakes could occur and the probability of occurrence as "rather low". Therefore, the level of foreseeability was not high.

- (3) Whether the accident could have been prevented if the regulatory authority had been exercised

Because it was foreseeable from the studies in 2006 that a tsunami could exceed the seawalls of the NPP site, the court concluded that TEPCO should have considered measures against this expected tsunami. The plaintiffs asserted that a number of

different measures[2] could have been adopted to protect against a tsunami, but the court found that other measures, such as installing higher seawalls, could also have been adopted to prevent the accident.

Furthermore, even if the measures asserted by the plaintiffs were adopted, construction work was expected to start after at least two to three years, due to various procedures such as applying for permission. In reality, more time may have been needed for public acceptance, design, construction and other matters. In addition, the certainty and accuracy of the earthquake prediction, from which the expected tsunami height was computed, was not very high; therefore, a tsunami exceeding the seawalls of the site was not considered an imminent threat.

Additionally, in 2006, earthquake measures were a more urgent issue. An earthquake safety assessment was underway in response to the September 2006 amendment of the Regulatory Guide for Reviewing Seismic Design of Nuclear Power Reactor Facilities, and earthquake measures became the focus of the government and TEPCO's resources. Thus, tsunami measures had been assigned a lower priority than earthquake measures. The government and TEPCO have limited financial and human resources, and it is not possible to enact measures to protect against every risk. Therefore, it is not unreasonable to prioritise the enactment of earthquake measures over tsunami measures based on a prediction with insufficient certainty and accuracy.

Taking all of these circumstances into account, even if the regulatory authority had been exercised, implementation of the measures advocated by the plaintiffs is likely to have been incomplete when the Fukushima accident occurred. Therefore, the court found that the station blackout caused by the tsunami exceeding the seawalls at the site could not have been prevented.

- Conclusion

Considering all of the above circumstances, the court did not find that the government acted unreasonably by failing to order the adoption of the protective measures asserted by the plaintiffs. Therefore, the lack of exercise of the regulatory authority cannot be considered to establish liability under the State Redress Act.

United States

Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894 (17 June 2019), affirming the lower court ruling that the Atomic Energy Act did not preempt a ban on conventional uranium mining on non-federal land

On 17 June 2019, the United States Supreme Court issued a decision in Virginia Uranium v. Warren, which involved a landowner's challenge to the US state of Virginia's ban on conventional uranium mining on private land (an activity that the US Nuclear Regulatory Commission [NRC] does not regulate).[3] The United States submitted a brief asserting that if Virginia Uranium's allegations concerning the motivation for the ban were true (i.e. if the motivation for the ban was a concern for radiological safety of NRC-regulated activities such as milling and tailings management), the ban was "preempted" by the US Atomic Energy Act because it was

2. These were measures to: i) protect the turbine building itself, such as by installing strength-enhancing doors at the entrance and exit; ii) prevent inundation of machinery rooms where important equipment such as emergency diesel generators are installed; and iii) protect the seawater pumps for cooling the existing emergency diesel generators by undertaking measures to waterproof the building in which they were located.
3. For historical information on the case, please see NEA (2018), "Virginia Uranium, Inc. v. Warren, 848 F.3d 590 (4th Cir. 2017)", *Nuclear Law Bulletin*, No. 100, OECD, Paris, pp. 90-92.

an attempt to regulate matters that are within the sole province of the NRC and cannot be regulated by the states.

The Supreme Court rejected this argument by a vote of 6-3 and upheld the ban, holding that it was not appropriate to attempt to ascertain the motivation behind Virginia's ban. The six justices in the majority, however, were not entirely in agreement. A majority of the court agreed that an inquiry into motive was not warranted where, as was the case with Virginia's ban on mining, the state had not imposed any restrictions on activities that the NRC regulates. But the decision did not rule out the possibility that a state's use of its authority that was either intended to interfere, or had the effect of interfering with, matters close to the core of the NRC's authority (such as construction or operation of a nuclear power plant or spent-fuel-storage facility) would still be preempted. As a result, it is likely that state regulation limiting the ability of NRC licensees or NRC licence applicants to take action otherwise permitted by the Atomic Energy Act will be vulnerable to preemption challenges.

NRC Atomic Safety and Licensing Board issues decisions in two consolidated interim storage facility cases

The NRC Atomic Safety and Licensing Board (Board) issued decisions in two cases challenging two different licence applications to build and operate a consolidated interim storage facility (CISF) for spent nuclear fuel and greater-than-Class C waste (collectively, SNF). Both applicants, Holtec International (Holtec) and Interim Storage Partners, LLC (ISP), seek 40-year licences to store canisters of SNF. The applicants seek to undertake these projects as possible temporary solutions for storing SNF from commercial nuclear reactors until a permanent repository is licensed and built. The NRC staff's review of both applications is ongoing.

In the Holtec proceeding, 6 petitioners raised 50 contentions challenging Holtec's application to build a CISF in Lea County, New Mexico. The Board issued its decision in May 2019, denying each petition.[4] Although the Board held that three petitioners demonstrated standing, it determined that none of their proffered contentions (challenges to the licensing) were admissible. Appeals of the Board's ruling by five petitioners, as well as one proposed contention filed after the Board issued its decision, are pending before the NRC Commission.

In the ISP proceeding, 4 petitioners raised 38 contentions challenging ISP's application to build a CISF in Andrews County, Texas. In August 2019, the Board granted the Sierra Club's request for a hearing and petition to intervene and denied the other participants' petitions.[5] The Board ruled that the Sierra Club proffered one admissible contention regarding, in part, the unavailability of ecological studies that ISP relied on in its Environmental Report to describe the project's impacts on two lizard species. Subsequently, ISP provided these studies and requested that the Board dismiss the contention, and Sierra Club filed an amended contention for the Board's consideration. Appeals by the other petitioners and the application are pending before the NRC Commission.

4. Holtec Int'l (HI-Store Consolidated Interim Storage Facility), LBP-19-4, 89 NRC __ (7 May 2019) (slip op. at 135-36) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML19127A026). Documents in ADAMS may be accessed through www.nrc.gov/reading-rm/adams.html.
5. Interim Storage Partners LLC (Consolidated Interim Storage Facility), LBP-19-7, 90 NRC __ (23 Aug. 2019) (slip op. at 106) (ADAMS Accession No. ML19235A165).