Case Law

Belgium

Raad van State [Council of State], 24 May 2018, nr. 241.575

In the case brought before the Belgian Council of State, the claimant, Greenpeace Belgium, contested the legality of an authorisation for the transport of spent fuel delivered by the regulator, the Federal Agency for Nuclear Control (FANC).

The claimant's first argument was based on the Euratom Basic Safety Standards Directive[1] and the transposition of the principle of justification. The claimant argued that in order for the regulator to deliver an authorisation for a transport there always has to be a verification of the principle of justification, which is to be based on a justification study. The Council of State clarified that there only has to be a justification study if the scope of the authorisation concerns an act that is considered a new type of practice and not for a demand to authorise a practice that was already considered as justified in the past.

For the second argument, the claimant raised an issue related to the ALARA principle in the Euratom Basic Safety Standards Directive. The Council of State stated that the application of the ALARA principle was correct in the specific case. The scope of the authorisation was a specific isotope, in a specifically designed package that guarantees constant compliance with the values and correlations provided in the Belgian Royal Decree of 20 July 2001 (related to the protection of people and the environment from radiation hazards). The evaluation of the ALARA principle does not oblige the regulator to evaluate possible alternatives for the transport.

France

Cherbourg high court (Tribunal de grande instance), 16 October 2018, No. 18-00061

In 2016, the Australian Nuclear Science and Technology Organisation (ANSTO) and AREVA NC (now ORANO CYCLE) signed a trade agreement on the reprocessing of spent fuel from an ANSTO research reactor. France and Australia agreed on the organisation of this reprocessing in a 23 November 2017 bilateral agreement that was published in the *Journal Officiel* [Official Journal] by decree on 6 July 2018.[2]

1. Council Directive 2013/59/EURATOM of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation, and repealing Directives 89/618/Euratom, 90/641/Euratom, 96/29/Euratom, 97/43/Euratom and 2003/122/Euratom, *Official Journal of the European Union* (OJ) L 13 (17 Jan. 2014) (Euratom Basic Safety Standards).
2. *Décret n° 2018-586 du 6 juillet 2018 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de l'Australie relatif au retraitement en France d'éléments combustibles nucléaires irradiés australiens, signé à Canberra le 23 novembre 2017* [Decree No. 2018-586 of 6 July 2018 on the publication of the agreement between the Government of the French Republic and the Government of Australia on the reprocessing in France of irradiated nuclear fuel elements from Australia, signed in Canberra on 23 November 2017], *Journal officiel de la République Française* [Official Journal of the French Republic] (JORF), 8 July 2018, text no. 10.

In September 2018, Greenpeace France asked ORANO CYCLE to view the contract signed between ORANO CYCLE and ANSTO. When this request was denied, Greenpeace France brought an action for summary judgement at the Cherbourg High Court (*Tribunal de grande instance*) to receive the various contracts signed within the framework of the trade agreement. Greenpeace France wanted access to these documents in order to assess the legality of the radioactive waste transport operations under Article L. 542-2 of the French Environmental Code, which prohibits the disposal in France of radioactive waste originating from a foreign country or from the processing of foreign spent fuel and foreign radioactive waste.

The judge dismissed all of Greenpeace France's claims. After reiterating the definitions governing the storage of radioactive materials and waste and the disposal of radioactive waste, the judge specified that:

> while the disposal of radioactive waste originating from a foreign country remains prohibited, it is nevertheless possible to introduce and store in France radioactive waste and spent fuel originating from a foreign country for treatment or reprocessing, provided that the said storage does not exceed a date established by inter-governmental agreements, on the grounds that, contrary to the provisions of the legislation applicable previously, storage is no longer subject to the technical time frames imposed by reprocessing.

Japan

Decision by the Hiroshima High Court on appeal regarding the operation of the Ikata nuclear power plant

On 25 September 2018, the Hiroshima High Court (hereinafter referred to as "Hiroshima HC") overturned an earlier decision of the Hiroshima HC, where the HC issued a preliminary injunction to halt operations of the Ikata nuclear power plant (NPP). The Hiroshima HC's September 2018 decision on appeal allowed the restart of the Ikata NPP.

Although the earlier Hiroshima HC decision was overturned on appeal, two points should be noted regarding this decision. First, civil lawsuits have been increasing in number in Japan since the Fukushima Daiichi NPP accident. One main reason for the increase in civil lawsuits is that plaintiffs are choosing civil actions over administrative actions because of the difference in subject matter. A wide range of issues can be targeted in civil lawsuits in Japan, including the risk of worker exposure, fuel transport and so on, for courts' examination. As a result, the Japanese legal system allows for the suspension of NPP operation in civil lawsuits, even if such operation conforms to the nuclear regulations. In administrative lawsuits, on the other hand, courts can only consider the illegality of the authorisation decision. Thus, the scope of examination in an administrative action is more limited when compared with civil actions.

Second, the traditional framework for decisions in civil lawsuits prior to the Fukushima accident had been adopted based on a Supreme Court decision in an administrative lawsuit seeking to cancel permission for the construction of reactors at the Ikata NPP, with a few exceptions.[3] However, while there were judicial rulings that adopted the traditional framework for decisions after the Fukushima accident, the courts harboured doubts about the content of regulatory standards set by the regulatory body. The courts pointed out the nuclear installation improvements

3. Supreme Court decision of 29 October 1992, Minsyu, Vol. 46, No. 7, p. 1174 (Ikata Supreme Court decision). A provisional translation of this decision is available on the Supreme Court website at: www.courts.go.jp/app/hanrei_en/detail?id=1399 (accessed 2 Apr. 2019).

needed for safety reasons. There were also judicial rulings that used this reasoning as a basis for their decisions. The Hiroshima HC's decision on the Ikata NPP case is the latest judicial ruling upholding a preliminary injunction to halt NPP operations. This decision is also the first preliminary injunction to adopt the determination of the Nuclear Regulation Authority (NRA) regarding the dangers presented by volcanic events as its basis.

The key to the decisions in this series of cases was how the courts evaluated the NRA's determination regarding the risks associated with volcanic events. First, under the Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material, and Reactors (hereinafter referred to as "the Act"), which was amended after the Fukushima accident, the NRA created the Volcanic Effects Assessment Guide (hereinafter referred to as "the Volcano Guide") to serve as a regulatory standard for volcanic activity. The interpretation of the Volcano Guide was an issue in each of the three decisions. As provided in the Volcano Guide, NPP locations are evaluated as follows:

1) In case future volcano activity is foreseeable within a 160 km radius (geographical region) of the NPP, the NRA should determine whether the possibility of volcanic activity is sufficiently negligible during the period of NPP operation (in principle, 40 years).
2) If the NRA could not determine that the possibility of volcanic activity noted in point (1) was sufficiently negligible, the NRA must estimate the likely scale of any eruption during the period of NPP operation (in principle, 40 years).
3) If the scale of any eruption as noted in point (2) could not be estimated, the largest scale of eruption that the volcano in question has experienced is to be assumed. The NRA should then evaluate whether the possibility was sufficiently small that the facility would not be able to withstand the volcanic event (pyroclastic flow).
4) If it would not be possible to conclude that the possibility of the pyroclastic flow reaching the NPP as described in point (3) is sufficiently small, the siting of the NPP (in this particular area) will be deemed inappropriate, and the NPP would not be permitted to be operated at this site.

The Hiroshima District Court decision (30 March 2017)

The plaintiff in this case is a local opposition group who sought a preliminary injunction against operations at the Ikata NPP. On 30 March 2017, the Hiroshima District Court (hereinafter referred to as "Hiroshima DC") ruled against the plaintiffs and denied their petitions. In the Hiroshima DC decision, it was determined that the assumption contained in the Volcano Guide was unreasonable, because it stated that the timing and scale of any volcanic eruption could be accurately predicted a considerable time beforehand. Further, the Act aims to ensure safety assuming a natural disaster of a reasonably predicted scale based on the latest knowledge. Thus, with regard to "catastrophic eruptions", unless it is determined that there is no reasonable possibility of occurrence, the NRA's determinations would be consistent with the Act's purpose even if the site is deemed appropriate. Such reasonable grounds are not indicated in this case; therefore, the Hiroshima DC concluded that the NRA's determination was rational and held that the location of the Ikata NPP in relation to the volcano was not inappropriate.

The Hiroshima HC decision (13 December 2017)

The plaintiffs immediately appealed the Hiroshima DC decision. Following the trial on appeal, the Hiroshima HC issued a decision approving the injunction on 13 December 2017, suspending operation of the Ikata NPP. The Hiroshima HC decided that there was not enough evidence to support the judgement that the possibility of the volcanic activity in question was sufficiently small during the period of operation

of the NPP. However, the Hiroshima HC did conclude that, apart from this issue, the Volcano Guide was consistent with international standards and affirmed that its content was rational.

The Hiroshima HC stated that current scientific knowledge could not find the possibility of volcanic activity and thus the court was not able to judge under point 1), and that it could not determine the likely scale of an eruption under point 2). Therefore, the Hiroshima HC assumed the largest past eruption under point 3) and evaluated whether the possibility of the pyroclastic flow reaching the facility was sufficiently small. Then, the Hiroshima HC determined that the siting of the NPP was inappropriate because such an evaluation was impossible to carry out based on submitted arguments and premises.

The Hiroshima HC further stated that it would be unacceptable to change the Volcano Guide's framework for considering natural disasters. Incidentally, the court cast doubt that the NRA had to assume extremely low frequency events such as "catastrophic eruptions".

The Hiroshima HC appeal decision (25 September 2018)

Thereafter, the defendant, Shikoku Electric Power Co., petitioned the Hiroshima HC with an objection to the temporary restraining order, resulting in an appeal hearing held on 25 September 2018. The Hiroshima HC decision was overturned, and the plaintiff's complaint was dismissed. Like the initial Hiroshima DC decision, the Hiroshima HC noted on appeal that the Volcano Guide was based on the premise that the timing and extent of any eruption of the volcano in question could be predicted with considerable accuracy and a considerable time in advance. It concluded that this premise was not realistic. Then, the court determined that the best assumption of the risk for a huge volcanic eruption should be based on social common sense. This social common sense means that the risk of such extremely low frequency events like "catastrophic eruptions" is not regarded as a problem by the general public here in Japan. Applying these general theories to this case, the Hiroshima HC found that the NRA's determination was not contrary to the purpose of the Act. Therefore, as no reasonable grounds were found for the possibility of "catastrophic eruptions" in this case, the Hiroshima HC concluded on appeal that the NRA's determination was rational and held that the location of the Ikata NPP in relation to the volcano was not inappropriate.

United States

Cooper v. Tokyo Electric Power Company, Imamura v. General Electric Company, and other US lawsuits related to the TEPCO Fukushima Daiichi NPP accident

Since the last report on two lawsuits then pending in US federal courts related to the 2011 TEPCO Fukushima Daiichi NPP accident,[4] there have been more developments that now involve five actions brought in US District Courts in California, the District of Columbia and Massachusetts. These lawsuits were initiated even though Japan's nuclear liability law channels liability for nuclear damage exclusively to nuclear operators and provides for unlimited liability. They have been allowed to proceed because the United States and Japan were not both parties to the Convention on Supplementary Compensation for Nuclear Damage[5] at the time of the Fukushima NPP accident. The CSC and other international nuclear liability conventions provide that

4. NEA (2017), "Cooper v. Tokyo Electric Power Company, No. 15-56426 (9th Cir. 2017)", *Nuclear Law Bulletin*, No. 99, OECD, Paris, pp. 73-74.
5. Convention on Supplementary Compensation for Nuclear Damage (1997), IAEA Doc. INFCIRC/567, 36 ILM 1473, entered into force 15 Apr. 2015 (CSC).

jurisdiction over nuclear damage actions lies only with courts of the contracting party within whose territory the nuclear incident occurred.

As previously reported, the first US lawsuit was filed in 2012 in the US District Court in San Diego, California.[6] Plaintiffs are US Navy service members (or those claiming through them) who were deployed off the Japanese coast as part of the US effort to provide earthquake relief, named Operation Tomodachi. The District Court in June 2015 denied TEPCO's motion to dismiss the complaint under the doctrine of international comity or *forum non conveniens*, but certified issues to the US Court of Appeals for the Ninth Circuit.[7] On interlocutory appeal, the Government of Japan filed an *amicus* brief expressing Japan's interest in centralising claims in Japan. In an amicus brief specifically requested by the Ninth Circuit Court of Appeals, the US Government argued that "the district court did not err in allowing Plaintiffs' claims to proceed for the time being" and "that allowing Plaintiffs' lawsuit to continue in the United States is consistent with US efforts to promote the [CSC]." On 22 June 2017, the Court of Appeals affirmed the District Court's denial of TEPCO's motion to dismiss the Cooper lawsuit, holding that the provision in Article XIII of the CSC for exclusive jurisdiction in courts of the incident country did not strip US courts of jurisdiction over claims arising out of nuclear incidents that occurred prior to the CSC's entry into force on 15 April 2015.[8] The Court of Appeals further held that the District Court did not abuse its discretion when it did not dismiss the lawsuit on grounds of *forum non conveniens* or international comity, even though it recognised that Japanese courts would provide an adequate alternative forum and that approximately 2.4 million Fukushima claims had been resolved in Japan with total payments then equivalent to more than USD 58 billion (now over USD 78 billion).

On 18 August 2017, counsel for the Cooper plaintiffs filed another lawsuit in the same court that they sought to have consolidated with the existing action.[9] The new Bartel lawsuit identified an additional 157 individuals who claimed to have been injured (for a combined total of 396 individuals). On 5 January 2018, Bartel v. TEPCO ("Bartel I") was dismissed on jurisdictional grounds, following a hearing on the motions of TEPCO and General Electric. The court found that there was no specific personal jurisdiction over TEPCO in California and that the Bartel I plaintiffs had not alleged that there is general jurisdiction over TEPCO in California. As to General Electric, the court found that there was no subject matter jurisdiction because the Bartel I plaintiffs did not provide information in their complaint about the citizenship of plaintiffs necessary to show complete diversity required under the federal diversity jurisdiction statute. The District Court's order granted the motions without prejudice. Rather than filing an amended complaint or appealing, counsel for the plaintiffs, on 14 March 2018, filed another action in San Diego with 55 new plaintiffs ("Bartel II").[10]

The Cooper plaintiffs filed a separate lawsuit in the US District Court for the District of Columbia on 14 March 2018 (the same day the substantially similar Bartel II complaint was filed in the District Court in San Diego).[11] On 25 March 2019, the District Court issued an order continuing its stay of this lawsuit previously stipulated by the parties until resolution of appellate proceedings for Cooper and Bartel II, with a joint status report due 14 days after the appellate resolution.

6. Cooper et al. v. Tokyo Electric Power Company, Inc. et al., No. 12CV3032 JLS-WMO (SD Calif., San Diego Div.).
7. 166 F. Supp. 3d 1103 (SD Cal. 2015).
8. 860 F.3d 1193 (9th Cir. 2017).
9. Bartel et al. v. Tokyo Electric Power Company, Inc. et al., No. 17CV1671 DMS KSC (SD Calif., San Diego Div.).
10. No. 18-CV-537 JLS (JLB) (SD Calif., San Diego Div.).
11. Holland et al. v. Tokyo Electric Power Company, Inc. et al., No. 18cv000573 (DDC).

On 13 September 2018, another lawsuit was filed in the Southern District of California on behalf of four US civilians working in Japan at the time of the Fukushima NPP accident.[12] On 28 March 2019, the District Court issued an order staying the proceedings until the conclusion of the appellate proceedings in Cooper and Bartel II.

On 4 March 2019, the District Court in San Diego dismissed both the Cooper and Bartel II lawsuits on various grounds, including that Japanese law should apply. Plaintiffs on 8 March 2019 appealed the District Court's dismissal order in the Cooper lawsuit to the US Court of Appeals for Ninth Circuit.[13] Appellants' opening brief in Cooper was due 24 June 2019. Appellees' answering brief in Cooper was due 24 July 2019. Plaintiffs on 14 April 2019, appealed the District's Court's dismissal order in the Bartel II lawsuit to the US Court of Appeals for Ninth Circuit (No. 19-55442 (9th Cir.)). Appellants' opening brief in Bartel II was due 25 July 2019. Appellees' answering brief in Bartel II is due 26 August 2019.

Another Fukushima NPP accident supplier-related lawsuit was filed in the US District Court for the District of Massachusetts in Boston on 17 November 2017.[14] The named plaintiffs are Japanese property owners, businesses and other commercial enterprises who brought this class action on behalf of more than 150 000 Japanese residents and hundreds of Japanese businesses who are alleged to have suffered property and other economic injury and damages as a result of Fukushima NPP accident. Defendants are General Electric and "Does 1-100" to be named later. The complaint contains several counts alleging negligence, strict liability and violations of various articles of the Civil Code of Japan by the defendants. Plaintiffs are seeking unspecified amounts of monetary and punitive damages. On 6 March 2018, General Electric moved to dismiss the Imamura lawsuit with prejudice, based on lack of subject matter jurisdiction, *forum non conveniens* and failure to state a claim. Among other points, General Electric said that deference by the Ninth Circuit Court of Appeals to the US Government's *amicus* brief in the Cooper v. TEPCO interlocutory appeal "was unwarranted," i.e. that the exclusive jurisdiction provision of the CSC (Article XIII) should apply. On 17 December 2018, the District Court held a hearing on General Electric's dismissal motion and requested the parties to file translations of the Japanese Fukushima NPP accident claims guidelines and information about the amount of monetary judgements in Japan. Such information was submitted on 26 February 2019. On 18 March 2019, General Electric informed the Boston Court of the San Diego Court's orders dismissing the Cooper and Bartel II lawsuits as well as the Japanese Supreme Court's 23 January 2019 decision upholding the constitutionality of channelling of liability to operator. On 8 April 2019, the Boston Court dismissed the Imamura lawsuit only on the grounds of *forum non conveniens*.

These US lawsuits can be expected to remain unresolved for some time: the Court of Appeals for the Ninth Circuit needs to rule again on the Cooper lawsuit, which could lift the stays in the Holland lawsuit in Washington and the Park lawsuit in San Diego. And a notice of appeal in the Imamura lawsuit was filed before the US Court of Appeals for the First Circuit on 1 May (Docket No. 19-1457 (1st Cir.). Appellants' opening brief was due 1 July 2019. Appellee's answering brief is due within 30 days of Appellants' brief.

Litigants engage in forum shopping when they think they can get more favourable outcome in another court, especially in the event of nuclear damage due to a nuclear incident occurring at a nuclear installation, which has transboundary damage with

12. Park et al. v. Tokyo Electric Power Company, Inc. and General Electric Company, No. 18cv2121(SD Calif., San Diego Div.).
13. No. 19-55295 (9th Cir.).
14. Imamura et al. v. General Electric Company and "Does 1-100", No. 1:17cv12278-FDS (D Mass.).

respect to states not in treaty relations. Plaintiffs tend to favour US courts, especially given the lower nuclear liability limits of other countries, the more generous attitudes of US juries, the potential availability of punitive damages, liberal discovery, contingency fees, large damage awards, etc. Additionally, non-governmental entities typically make attractive targets for plaintiffs' lawyers, because, for example, they can be subject to jury trials (where the Federal Tort Claims Act does not allow jury trials when the claim is against the US Government), have fewer defences against executions of judgements, lack sovereign immunity, etc. The still pending US lawsuits confirm what can occur when there are not treaty relations providing for a single competent court in the territory where the nuclear incident occurred.

State of Nevada v. US Nuclear Regulatory Commission and David A. Wright, No. 18-1232 (unpublished) (DC Cir. 2019)

The state of Nevada filed a petition for review challenging a decision by Commissioner David Wright of the US Nuclear Regulatory Commission (NRC) not to recuse himself from the licensing proceeding for a proposed nuclear waste repository at Yucca Mountain, Nevada. Prior to his appointment as a member of the Commission, Commissioner Wright had been a Commissioner on the state of South Carolina Public Service Commission. Commissioner Wright had also supported the National Association of Regulatory Utility Commissioners (NARUC) when it intervened in the Yucca Mountain adjudicatory proceeding before the NRC and argued that the US Department of Energy could not withdraw its licence application. The state of Nevada cited several statements made by Commissioner Wright related to that proceeding, including statements expressing the view that the process for evaluating Yucca Mountain as a repository site should be completed, as evidence that he could not be an unbiased judge in the proceeding.

The NRC moved to dismiss Nevada's petition before the DC Circuit, arguing that: 1) the petition did not satisfy the limited waiver of sovereign immunity in the Nuclear Waste Policy Act; 2) Nevada had not raised its claims as a petition for mandamus, which would have been proper under the circumstances, instead of a petition for review; and 3) the case was not "ripe" for review because the adjudicatory proceeding remains suspended and the construction permit application might never be granted.

The Court issued an unpublished *per curiam* opinion that granted the NRC's motion to dismiss on the third ground noted above. The Court ruled that the case was not ripe for review because it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all[,]" citing an earlier decision in a similar case involving former Chairman Allison Macfarlane in 2014.