CASE LAW AND ADMINISTRATIVE DECISIONS

CASE LAW

Belgium

Judgement allowing the return of nuclear waste from France (2000)

Following an application for interim proceedings lodged by the ecological association Greenpeace with a view to prohibiting the first repatriation of nuclear waste from France, the Court of Dendermonde, in its judgement of 2 April 2000, had prevented the return to Dessel of vitrified waste resulting from the reprocessing of Belgian nuclear fuel at the Cogema plant in La Hague. The judge had forbidden the SNCB (the Belgian railway network), Synatom (a subsidiary of Electrabel, the legal owner of the waste) and the Belgian state "from carrying out any action which could facilitate the transport, or from arranging any such transport, of nuclear waste", on the grounds that there was no emergency plan which would apply in the event of an accident.

The Minister for the Interior appealed this decision through interim proceedings on the grounds that the necessary safety measures had been taken. On appeal, the Court of Dendermonde overruled the first judgement, on 4 April 2000.

The return of the waste, which took place on 5 April 2000, is to be the first of fifteen transport operations planned over the next ten years.

France

Council of State Judgement on the Risk Analysis within the Licensing Application (1999)

The Administrative Court of Appeal of Lyon, in its judgement of 21 January 1992 concerning a licensing application for the storage of uranium sesquioxide, ruled that the environmental impact study for an installation classified for purposes of environmental protection must contain an analysis of the effects of the installation on the environment, not only under normal operating conditions but also in the case of an externally-caused accident liable to affect this installation. In doing so, this judgement did not clearly distinguish between the risk analysis and the environmental impact study.

The Council of State overruled this decision in its judgement of 7 July 1999, on the grounds that the Court of Appeal had incorrectly interpreted the law in stating that the impact study was in breach

of the regulations, as it did not contain an analysis of the exceptional environmental consequences which would result for example from an accident or an aeroplane crash.

The Council of State pointed out that the analysis which identifies the risk an installation can constitute in the event of an accident, which must be included in the document required under paragraph 5 of Section 3 of Decree No. 77-1133 of 21 September 1977 adopted in implementation of Act No. 76-663 of 19 July 1976 on installations classified for environmental protection purposes (see *Nuclear Law Bulletin* Nos. 18, 36 and 39), is not amongst the information which must be included in the impact study. The latter is simply required to draw attention to the effects that the project is likely to have on the environment.

The Council of State furthermore confirmed the decision of the Marseilles Administrative Court to annul the authorisation order, on the basis of an insufficient risk analysis, in relation to the emergency measures at the disposal of the establishment. Having regard to the installation's role as a storage facility for sensitive materials, the Council of State criticised the risk analysis for not giving sufficient details on the composition of the intervention teams mentioned in the study, their localisation and availability, on the type and extent of material equipment at their disposal and on the organisation of possible emergency aid.

Judgement of the Cour de Cassation on the Operation of a Classified Installation without a Licence (1999)

The criminal chamber of the *Cour de Cassation* (French Supreme Court), in its judgement of 13 April 1999, ruled that production in excess of that authorised in the licence, carried out by an installation classified for environmental protection purposes, can be compared to carrying out operations without a licence. This offence represents a failure to respect a safety regulation and, in the event of an accident, can justify a condemnation for manslaughter.

Japan

Rejection of claims calling for permanent closure of the Monju reactor (2000)

On 22 March 2000, the Fukui District Court rejected a lawsuit filed by local residents calling for the permanent closure, on safety grounds, of Japan's prototype fast-breeder nuclear reactor, Monju, located in Tsuruga, Fukui Prefecture.

The construction of Monju began in 1985 and was completed in 1991. After its first brief period of electricity production in August 1995, a coolant leak and ensuing fire in December 1995 led to its closure. Operations have been suspended since that date.

The lawsuit, which comprised both administrative and civil actions, was filed in September 1985, one month before the beginning of the construction of the reactor, by approximately 40 local residents. The administrative action consisted of a claim against the Prime Minster to invalidate his permission granted for construction, based on a flaw in both safety evaluation standards in general and the evaluation of Monju in particular. The civil action consisted of a claim against the Japan Nuclear Cycle Development Institute (JNC), the constructor and operator of Monju, calling for cessation of construction and operation in light of the risk posed to the plaintiffs' lives and health.

On the administrative aspects, Presiding Judge Iwata of Fukui District Court ruled that there was no procedural illegality in the government's procedure for issuing the Monju licence and no recognisable flaw in safety evaluation standards or the government's evaluation of Monju against those standards, including seismic criteria. Judge Iwata further ruled that the sodium leakage accident in 1995, which was attributed to corrosion caused by poor design, did not prove the safety standards were wrong. On the civil law aspects, he rejected the claim by stating that even after taking the sodium leak into account, "it is unlikely that an accident that releases a large amount of radioactive substances into the environment will occur (at the plant) or that the reactor poses any visible danger of infringing upon the lives or health of the plaintiffs".

The case took so long because the plaintiffs first had to establish their legal right to sue, which took almost seven years. It took until September 1992 before the Supreme Court recognised their *locus standi* and referred the case to the Fukui District Court.

Following this judgement, the Chairperson of JNC stated that full efforts would be made to promptly resume operations in Monju.

The plaintiffs filed an appeal against both lawsuits with the Nagoya High Court on 24 March 2000.

Netherlands

Decision of the Council of State invalidating the limitation in time attached to the operating licence of the Borssele plant (1999)

The Council of State, the supreme administrative court in the Netherlands, ruled on 24 February 2000 that the Dutch Government had no legal basis for limiting the operating licence of the Borssele Reactor (450 MW) to 2004 in exchange for compensation for the operating utility, EPZ.

This ruling ensued from a challenge initiated on 10 December 1999 by a group (the so-named "Foundation Borssele 2004+"), mostly personnel of the plant, against the agreement concluded in 1997 between the government and SEP, which was at the time the parent company of EPZ, on the future of this unit. This agreement provided that the reactor could only be exploited until the end of 2003. The Dutch parliament voted in favour of shutting down Borssele at the end of 2003, even though the operating licence had been renewed four months earlier and no expiry date had been specified. However, as the utility had invested a substantial sum of money in a comprehensive upgrade programme in 1994, and because the design lifetime of the plant was not due to expire until 2013, the parliament approved compensation for EPZ for a fraction of the money invested in the upgrade. The Foundation Borssele 2004+ claimed that the government's decision was invalid because it modified the existing operating licence, unlimited in time, and because no environmental impact study was carried out as required by the Nuclear Energy Act. Given that the closure of the only nuclear power plant in the country would lead to the increase of energy production in fossil fuel plants, it claimed that this measure would lead to environmental consequences which should be taken into consideration pursuant to the applicable legislation.

The Council of State declared that the expiry date of the amended operating licence issued in 1997 is invalid. It stated that the Nuclear Energy Act specified on which grounds a nuclear licence can be revoked. The decree to shut down the reactor had not been reviewed on these grounds and therefore had no legal basis.

Decision of the Council of State rejecting licences for storage and transport of nuclear fuel (1999)

On 29 November 1999, the Council of State, the supreme administrative court in the Netherlands, rejected licences issued by the government for storage and transport of spent fuel from two of the country's reactors, stating that they contained insufficient justification and too little public information about the chosen transport routes. The Council of State ruled in favour of the plaintiff, Greenpeace, which sought to prevent the spent fuel shipments from the decommissioned Dodewaard BWR to BNFL's Sellafield plant for reprocessing. The court also nullified a licence issued to national radwaste company Covra for storage of spent fuel from the European Commission's High-Flux Reactor at Petten.

The Council of State ruled that the licences failed to comply with the Nuclear Energy Act which requires justification of any nuclear activity and allows for public intervention. It stated that the ministry's licences did not demonstrate that the transports were justified in terms of radiation protection. Moreover, since the licence failed to provide details on the route from Dodewaard to the port of Vlissingen, the court said it would be impossible for Dutch citizens along that route to intervene, as they are entitled to by law.

United States

Decision rejecting a request to bar MOX fuel shipment (1999)

On 17 December 1999, the US District Court of the Western District of Michigan denied the plaintiffs' request for a preliminary injunction barring the Department of Energy (DOE) from shipping mixed-oxide (MOX) fuel containing a small quantity of weapons-grade plutonium to Canada. This shipment of nine MOX assemblies which are to help determine whether Candu reactors can use such fuel is part of the non-proliferation project called Parallex which is carried out by the DOE and Russia. Russia is also to ship nine MOX assemblies to Canada.

The Court rejected the request on the grounds that the shipment reflects a policy decision made by the Federal administration and that disagreements over policy decisions should be settled by elected officials rather than by the courts.

Moreover, against the plaintiffs' charge that the DOE should have examined the environmental impact of the MOX shipment carried out by Russia to Canada along the US boundary, the Court ruled that this shipment is the subject of a trilateral agreement among the US, Canada and Russia, and therefore the US exercises some control over the shipment. The Court noted that, as the environmental impact assessment which the DOE carried out on its own MOX shipment recognised that an accident involving the American shipment of MOX might have transboundary effects on the Canadian population, it would have been logical that it also take account the possibility that an accident involving the Russian MOX shipment might also have transboundary effects on the American population.

European Union

Lirussi v. Bizzaro (1999)

In the context of the criminal procedures instituted against Mr. Lirussi and Mrs. Bizzaro who are charged with having stored waste under irregular conditions, an Article 177 reference was made to the European Court of Justice on four questions in relation to the interpretation of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended. In a Judgement of 5 October 1999, the Court defines the notion of "temporary storage" of waste of all types and the legal regime governing this kind of storage.

Pursuant to the Article 177 reference, the Court was to rule on several points: it was requested, on the one hand, to determine whether the meaning of "temporary storage" is different from that of "storage of waste pending further operations" and whether it is considered as a "management activity"; and, on the other hand, whether the competent national authorities are required, in respect of temporary storage activities, to ensure compliance with the requirements set out in Article 4 of Directive 75/442/EEC, namely to ensure that waste is disposed of without endangering human health and without harming the environment and to take the necessary measures to prevent the abandon, release and uncontrolled disposal of waste.

On the first point, the Court stated that these concepts are different on the grounds that "storage pending further operations thus forms part of the disposal or recovery of waste, whilst temporary storage pending collection is expressly excluded." Temporary storage activities are therefore defined as an activity preceding a waste management activity. Such temporary storage should then not be subject to the provisions of Directive 75/442/EEC. However, ruling on the second point, the Court noted that Article 4 of Directive 75/442/EEC aims to implement the principles of precaution and preventive action set out in Article 130r of the EC Treaty. Therefore, to the extent that waste, even stored temporarily, may cause significant harm to the environment, the provisions of Article 4 of the Directive, which aim to implement the principle of precaution, should also apply to the temporary storage activity.

European Court of Human Rights

Athanassoglou and Others v. Switzerland (2000)

The European Court of Human Rights, in its judgement of 6 April 2000, confirmed its case law as established in *Balmer-Schafroth and Others v. Switzerland*, judgement of 26 August 1997 concerning the Swiss Federal Council's decision to extend the operating licence of the Mühleberg nuclear power plant in the Canton of Bern (see *Nuclear Law Bulletin* No. 60). The Court had declared in that case that Swiss law did not violate the appellants' civil rights in refusing to provide for the possibility of appealing government decisions on the licensing of nuclear power plants in court.

Following the government's decision of 12 December 1994 to extend the licence of the *Nordostschweizerische Kraftwerke AG* ("NOK") to operate the Beznau nuclear power plant in the Canton of Aargau for a further ten years, twelve Swiss nationals living in the vicinity of the plant lodged an application with the European Commission of Human Rights against the Swiss Confederation. In order to contest the Federal Council's decision, the applicants claimed that they were denied effective access to a court, in breach of Article 6(1) of the European Convention on

Human Rights, also invoking that under the terms of Article 13 of the Convention, no effective remedy was available to them enabling them to complain of violations to their right to life and their right to respect for bodily integrity. In its report of 15 April 1998, the Commission expressed the opinion that none of these provisions were violated.

The case was then referred to the European Court of Human Rights. The Court, confirming the Commission's decision, rejected the appeal on the grounds that the connection between the Federal Council's decision and the rights of the applicants to protection of their civil rights (right to life, physical integrity and property) recognised in Swiss domestic law was too tenuous and remote to attract the application of Article 6(1). In respect of the invocation of this Article in order to contest the very principle of the use of nuclear energy, the Court considered that "how best to regulate the use of nuclear power is a policy decision for each Contracting State to take according to its democratic processes". For the same reasons, the Court ruled that Article 13 of the Convention is inapplicable in this case.

In light of this judgement, the Swiss authorities will soon reconsider, during the amendment of the Atomic Act, the possibility of including a right to appeal decisions on the licensing of nuclear power plants before national courts.

ADMINISTRATIVE DECISIONS

Argentina

Decision on the establishment of the Interministerial Commission for Atucha II (2000)

Law No. 28.804 of 1997 on Nuclear Activities (see *Nuclear Law Bulletin* No. 59) and its implementing Decree No. 1390 of 1998 (see *Nuclear Law Bulletin* No. 63) provided for the privatisation of the Atucha I and Embalse nuclear power plants as well as the completion of construction and commissioning of the Atucha II NPP. In this respect, Administrative Decision No. 13/2000 of 7 February 2000 provides for the establishment of an Interministerial Commission for Atucha II, which will aim to examine the prospects of completing construction of this NPP and to propose a solution concerning its "final fate" (completion, postponement or redirecting of construction work). This Commission is headed by the Secretary of State for Technology.

Until now, only the National Atomic Energy Commission has drawn up a study ("Atucha II and nuclear policy") which is in favour of completing the construction of Atucha II. However, as long as the Secretary of State for Energy has not made his opinion known, the final decision of the government will be uncertain.

Sweden

Agreement between Sydkraft, Vattenfall and the Swedish Government on a compensation plan for the early shutdown of Barsebäck unit 1 (1999)

Following the Swedish Government's Decision of 5 February 1998 to shut down unit 1 of the Barsebäck nuclear power plant and the judgement of the Supreme Administrative Court of 16 June 1999 confirming this Decision (see *Nuclear Law Bulletin* No. 64), this unit equipped with a 600 MW boiling water reactor was permanently shut down on 30 November 1999.

At the same time, the private electricity utility Sydkraft, owner of the installation, the state-owned utility Vattenfall and the Swedish Government approved a compensation plan in respect of the early shutdown of Barsebäck unit 1 and commenced negotiations on the shutdown of unit 2. This Agreement has yet to be approved by the Swedish Parliament; however in the meantime, the Parties will act as if it were already approved.

Under the Agreement, Barsebäck Kraft AB (BKAB), the subsidiary of Sydkraft which operates the two reactors, will sell them to Sydsvenska Vaerme Kraft AB (SVKAB), also a wholly owned subsidiary of Sydkraft. SVKAB will merge with the Ringhals NPP which belongs to Vattenfall in order to form one single utility. Sydkraft, through SVKAB, will own 25.8% of the new company and Vattenfall 74.2%. Barsebäck 2 will continue to operate under the management of the new utility Ringhals/Barsebäck. If this unit is to be shut down, Sydkraft's share in the new company will reach 30.2%, in which case Vattenfall will receive additional financial compensation from the state.

Under the Agreement, in return for relinquishing part of its production capacity, Vattenfall will receive compensation of approximately Swedish kronor (SEK) 5.65 billion in total, including SEK 2.64 billion in cash from the state to be paid over a four-year period beginning in 2000, the value of Vattenfall's share in the new company and an annual payment from Sydkraft to cover the difference in production costs between Ringhals and Barsebäck. For its part, Sydkraft should receive SEK 113 million.

The state will also pay the new company SEK 1.1 billion for decommissioning costs specifically associated with the early shutdown of unit 1 and up to SEK 2.2 billion to cover the higher operating costs of Barsebäck 2.

Sydkraft will be responsible for normal decommissioning costs at Barsebäck and Vattenfall, for Ringhals, in accordance with Swedish law on this subject (1981 Act on Financing Future Expenditure for Spent Nuclear Fuel – see *Nuclear Law Bulletin* No. 29) which states that each reactor owner is responsible for the handling of spent fuel and nuclear waste and for its decommissioning.

Whereas the government had ordered that unit 2 of Barsebäck be shut down by 1 July 2001, on 30 November 1999 it indicated that the reactor will only be shut down when production capacity replacement is ensured. The shutdown of Barsebäck 1 will cause a shortage of up to 4 billion kWh in annual electricity production. This loss will have to be compensated primarily by the import of electricity from Danish and German coal-fired stations.

Switzerland

Rejection of the constitutional initiative requesting shutdown of the Mühleberg nuclear power plant by the government of the canton of Bern (1999)

On 7 June 1999, the *Bern ohne Atom* (Bern without Atoms) Committee provided the State Chancellery with a petition for a cantonal initiative to oblige the government of the canton, by popular opinion, to do anything within its power to ensure that the Mühleberg NPP, owned by BKW FMB Energy SA, be shut down as quickly as possible.

The government of the canton of Bern rejected this initiative on the grounds, first, that the supervision of nuclear installations and the guarantee of their safety are within the competence of the Confederation, and that the Federal Council had extended, in October 1998, the operating licence of this NPP until 2012 (see *Nuclear Law Bulletin* No. 63). It also considered that such an initiative directly interferes with the commercial policy of a private enterprise.

The cantonal government furthermore ruled that early shutdown would have negative consequences on the economy in Bern. According to its estimations, it would lead to an annual loss of added value of some Swiss francs (CHF) 50 million as well as the loss of 300 highly qualified jobs.

Finally, the early shutdown of the plant is deemed questionable in relation to ecological and energy policy. The production of this plant represents 40% of the electricity needs of FMB's customers, and only a limited quantity of the production could be compensated through energy savings and increased use of renewable energy sources. The demands would principally have to be covered by electricity imports, which raises ecological concerns.

For these reasons, the Bern Government rejected the cantonal initiative and proposed to the Federal Council to submit it to the electorate without a counter-proposal. This issue should be submitted to the public on 23 and 24 September 2000.

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