

CASE LAW AND ADMINISTRATIVE DECISIONS

CASE LAW

Bulgaria

Ruling of the Supreme Administrative Court on the Decision to shut units 3 and 4 of Kozloduy NPP (2003)

On 28 March 2003, Bulgaria's Supreme Administrative Court annulled the government's Decision of 1 October 2002 to close units 3 and 4 of Kozloduy nuclear power plant by the end of 2006. Closure of the two units before the ends of their original design lifetimes, in 2010 and 2012 respectively, is a condition of entry into the European Union as expressed in the energy chapter of the Bulgarian European Union accession package, adopted at an intergovernmental conference of European Union member states.

The Court upheld the ruling of a three-judge panel of 9 January 2003 which decided that the government did not provide sufficient evidence that it had fully assessed the social, economic and safety aspects of the premature closure of the two units. The government appealed that ruling on behalf of the Ministers of Energy, European Affairs and Foreign Affairs. The Supreme Administrative Court's decision is final and not subject to appeal.

The government's Decision of 31 December 2002 to close units 1 and 2 of Kozloduy nuclear power plant was also challenged but the Court rejected that argument in January 2003.

France

Judgement of the County Court of Cherbourg concerning the import of spent fuel to La Hague (2003)

On 3 February 2003, the Country Court (*Tribunal de grande instance*) of Cherbourg rejected the applications of two associations (*Manche Nature* and *Greenpeace France*) to prevent the General Company for Nuclear Materials (*Compagnie générale des matières nucléaires – Cogema*) from unloading and storing spent nuclear fuel from Australia and Germany at its factory in La Hague. This judgement follows a procedure initiated in 2001 which resulted in the Court of Appeal of Caen reversing the judgement of the same County Court and thereby authorising the unloading of the spent fuel (see *Nuclear Law Bulletin* No. 68). In May 2001, Greenpeace served another writ against Cogema before the Cherbourg County Court on new procedural grounds.

The associations claimed that Cogema had not yet obtained reprocessing licences and therefore these operations were in breach of Article 3 of the 1991 Act on Radioactive Waste Management (see *Nuclear Law Bulletin* Nos. 49 and 50; the text of this Act is reproduced in *NLB* No. 49) which prohibits the storage in France of imported radioactive waste longer than is technically necessary for reprocessing activities.

The Court rejected the applications on the following grounds:

- Irradiated fuel, which has been the object of contractual arrangements for reprocessing, must be considered as recyclable source materials, and in any event as material destined for further transformation rather than material to be disposed of;
- Mixed oxide (MOX) fuel or research reactor (MTR) fuel imported for reprocessing purposes has already been the subject of a general reprocessing authorisation by the Directorate for the Safety of Nuclear Installations (*Direction de la sûreté des installations nucléaires*). Although the actual operating licence has not been issued, such fuel could not be considered as radioactive waste pursuant to the 1991 Act. As Article 3 of that Act refers specifically to waste resulting from reprocessing activities, Cogema cannot be accused of having imported and stored spent fuel with a view to its reprocessing.

The two associations have appealed this decision.

Japan

Judgement of the Nagoya High Court on the invalidity of the licence to establish the Monju reactor (2003)

On 27 January 2003, the Kanazawa Branch of the Nagoya High Court pronounced its judgement on appeal in relation to a case 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. Monju supplied its first electricity to the grid in 1995, but a sodium leakage incident in December of that year led to the 280 MW unit being shut down. The Fukui District Court had rejected this lawsuit in March 2000 (see *Nuclear Law Bulletin* No. 65).

The Nagoya High Court reversed the ruling of the Fukui District Court. The High Court specifically faulted safety assurances related to the design of the steel liner to prevent leaking sodium from contacting concrete reactor structures and the design of the steam generators. It further stated that it had not been demonstrated that a core damage accident could be successfully mitigated.

The appellate court did, however, sustain the ruling of the District Court on one point, where it had ruled that the safety analysis of the reactor's potential seismic risk was adequate.

The Japanese government initiated appeal procedures on 31 January 2003.

Judgement of the Mito District Court issuing penalties in respect of the Tokai-mura accident (2003)

On 3 March 2003, the Mito District Court issued suspended jail sentences and imposed financial penalties in relation to the 1999 criticality accident at the fuel processing facility operated by JCO at Tokai-mura (see *Nuclear Law Bulletin* No. 66). This incident, during which workers at the plant were allowed to load uranium into buckets and – dispensing with crucial safety measures – to pour several times the authorised amount of the material into a processing tank, led to a criticality accident which caused the death of two workers and caused radioactive releases.

The former head of the plant was sentenced to three years in prison, suspended for five years, and a fine of JPY 500 000.¹ A further five individuals were also found guilty of professional negligence and received prison terms ranging from two to three years, suspended for three or four years. JCO was itself fined JPY 1 million.²

The court rejected the defence’s argument that the Japanese government and the former Power Reactor and Nuclear Fuel Development Corporation (now the Japan Nuclear Cycle Development Institute – JNC) were partly at fault.

United Kingdom

The Principle of Justification: the Application of the Principle to the Manufacture of MOX Fuel in the UK*

Introduction

1. On 3 October 2001, the Secretary of State for the Environment, Food and Rural Affairs and the Secretary of State for Health (“the Secretaries of State”) issued a decision that the practice of manufacturing mixed oxide fuel (MOX) in the United Kingdom (UK) was “justified” in accordance with EU legislation, namely, Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation (“the 1996 Directive”; see *Nuclear Law Bulletin* No. 58). This brought to a conclusion a decision-making process that had commenced almost five years earlier. The following section of this paper very briefly reviews the way this decision-making process was conducted by the relevant UK regulatory authorities. Following that, an account is given of the legal issues and the challenge, by way of a judicial review, that was made to overturn the decision of the Secretaries of State in the UK courts.

1. This corresponded at the end of April 2003 to approximately EUR 3 766.

2. This corresponded at the end of April 2003 to approximately EUR 7 533.

* This note on case law has been kindly prepared by Dr. W.J. Leigh, Senior Legal Adviser with British Nuclear Fuels plc. (BNFL). Responsibility for the facts contained and the ideas expressed therein remains solely with the author.

Summary of the Factual Background to the Decision-making Process Regarding the Justification of MOX Fuel in the UK

2. In 1994, British Nuclear Fuels plc (BNFL), the operator of the Sellafield nuclear site, commenced the construction of a MOX plant at Sellafield. The plant is known as “SMP”. In late 1996, BNFL applied to the UK Environment Agency (“the EA”), submitting information in support of its application that SMP was justified within the meaning of the then relevant Directive – Council Directive 80/836/Euratom of 15 July 1980, amending the Directives laying down the basic safety standards for the health protection of the general public and workers against the dangers of ionising radiation, as amended (“the 1980 Directive”; see Nuclear Law Bulletin No. 26).¹ The EA conducted a first round of public consultation in early 1997 but decided that a further economic appraisal was required. BNFL produced its own economic report on SMP. The EA then appointed independent consultants – PA Consulting Ltd – to review the BNFL report and produce its own economic report on SMP (“the PA Report”), which concluded that the economic case for SMP was strongly positive. A second round of public consultation was commenced in early 1998 as part of which a public domain version of the PA Report was published, with commercially confidential information redacted (“blacklined”). It is relevant to note (in the light of the subsequent legal challenge) that in assessing the economic case for SMP, the PA Report ignored “sunk costs” – that is the capital costs of the plant that had already been spent. These costs amounted, at the time, to around 300 million pounds sterling (GBP)..
3. In November 1998, the EA published its proposed decision which was that the operation of SMP was justified. The radiological impact of SMP in terms of discharges and resultant radiation doses was confirmed to be insignificant and the economic benefit was strongly positive, but nonetheless the EA referred the matter to the Secretaries of State and noted that it had not taken into account the wider issues of plutonium management. In June 1999, the Secretaries of State indicated a provisional conclusion in favour of SMP but concluded that further blacklined information in the PA Report should be released into the public domain.² At the same time they decided that the uranium commissioning of SMP could proceed. A third round of public consultation was commenced in 1999 on the PA Report containing the newly released information. Following this, the MOX data-falsification incident at the Sellafield MOX Demonstration Facility (“MDF”) occurred and the profound effects of this raised concerns about the validity of the conclusions in the PA Report regarding customer confidence and the existence of markets for MOX from SMP. In early 2001, BNFL – having made strenuous efforts to re-build customer confidence – submitted an updated economic case on SMP, to the government and a public domain version of this report was the subject of a fourth round of public consultation.³ In the spring of 2001, the Secretaries of State appointed independent consultants – A.D. Little (“ADL”) to review BNFL’s economic case on SMP and carry out their own economic appraisal. ADL produced a report in July 2001 (“the ADL Report”) and a public domain version (redacted to exclude commercially confidential information) formed the basis of a fifth round of public consultation. The ADL Report concluded that the economic case for SMP remained strong: the plant would provide significant economic benefits having a net present value (“NPV”) of GBP 216 million. Again, however, ADL (as was the case with PA Consulting) ignored sunk costs, which by this time had reached GBP 470 million. The October

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1. Directive 80/836/Euratom was amended by Council Directive 84/467/Euratom of 3 September 1984 (see Nuclear Law Bulletin No. 34).
 2. A MOX market review prepared by BNFL was also put into the public consultation.
 3. A second, updated, MOX market review prepared by BNFL was also put into this consultation.

2001 decision of the Secretaries of State followed shortly after the conclusion of this fifth and final round of public consultation.

Legal Issues and the Legal Challenge in the UK Courts

4. The decision of the Secretaries of State on justification was taken under a UK statute – the Radioactive Substances Act 1993 (“RSA 93”; see *Nuclear Law Bulletin* No. 54). Interestingly, however, the provisions of RSA 93 do not expressly require a “justification” exercise. It was accepted by all concerned, however, that RSA 93 should, under the *Marleasing* principle,⁴ be construed consistently with the relevant obligations imposed on the UK under the relevant EU Directive.
5. As stated, when the EA made its proposed decision in November 1998 the relevant Directive was the 1980 Directive. Article 6(a) of the 1980 Directive (as amended) dealt with the principle of justification and provided as follows:

“The limitation of individual and collective doses resulting from controllable exposures shall be based on the following general principles: (a) the various types of activity resulting in an exposure to ionising radiation shall have been justified in advance by the advantages they produce.”
6. It is relevant, in the context of the legal challenge to the justification of MOX manufacture, to note that the argument that justification, as expressed in the 1980 Directive, had not been properly considered was put forward in earlier UK cases relating the commissioning and operation of the BNFL Thermal Reprocessing Plant at Sellafield (“THORP”). Note that legal challenges such as those under consideration are carried out in the UK by means of a judicial review – a party with legal standing (and an environmental organisation such as Greenpeace has sufficient standing) applies to the court to have the relevant decision set aside on particular grounds – for example, that the decision-maker has acted unlawfully.
7. In *R v HMIP and MAFF, ex parte Greenpeace*⁵ (see *Nuclear Law Bulletin* No. 54) it was argued by Greenpeace that the permission given for the testing of THORP was unlawful because the plant had not been “justified” in accordance with the 1980 Directive. Otton J. found that the need for testing was established in terms of its overall benefit. The learned judge went on to say that it was also relevant to bear in mind that the need for THORP was considered at the planning stage by virtue of a 100-day Public Enquiry presided over by Mr. Justice Parker and during the Parliamentary process before planning approval was given. Thus, Otton J. concluded that in a broad sense THORP had already been “justified in advance”. However, a markedly different conclusion was drawn by Potts J. in *R v Secretary of State for the Environment and others ex parte Greenpeace and others*⁶ when considering whether there was a legal requirement to consider justification when granting new Sellafield discharge authorisations which would allow THORP to become fully operational. Even though, as stated, RSA 93 does not refer specifically to justification in any of its provisions, Potts J. held that RSA 93 was to be construed

4. See *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I – an EU Member State is obliged if possible to apply its legislation in conformity with a relevant Directive. This may mean reading words into legislation or applying it through conforming with Administrative actions.

5. [1994] Env. L. R. 76.

6. [1994] Env. L.R. 401.

consistently with the requirements of the 1980 Directive. It followed that there was a legal obligation to carry out a justification exercise before the grant of authorisations – neither the Parker Report nor the Parliamentary debates had, according to Potts J., performed this exercise. Significantly, this led Potts J. to conclude that a combination of the 1980 Directive and ICRP recommendations (see further below) meant that the 1980 Directive was concerned with particular types of activity – in this case the particular type of activity was thermal oxide reprocessing carried out at THORP at Sellafield. It was the operation of this particular plant that needed to be specifically justified. Note that the final outcome of the THORP judicial review on this issue, however, was that although the relevant Ministers were wrong in law in concluding that they were not legally obliged to consider the justification issue, given that they had considered it anyway in a manner which could not be faulted, the claimants failed to establish that the respondents had acted unlawfully.

8. The fact that Potts J. in the THORP judicial review had ruled that the justification was concerned with particular activities in a particular plant had an important consequence for the MOX justification exercise. It meant that the evidence submitted to and considered by the decision-makers was largely concerned with the operation of the relevant MOX plant, i.e. the economics and operation of SMP itself rather than MOX manufacture generally were the main focus of attention. It was this aspect and the different wording in, and interpretation given to, the 1996 Directive to the question of justification which ultimately was to give the claimants (Greenpeace and Friends of the Earth) their strongest arguments in their challenge to the October 2001 MOX decision.
9. The 1996 Directive came into force in May 2000. Earlier Directives, including the 1980 Directive were repealed. Article 6(1) of the 1996 Directive provides:

“Member States shall ensure that all new classes or types of practice resulting in exposure to ionising radiation are justified in advance of being first adopted or first approved by their economic, social or other benefits in relation to the health detriment they may cause.”
10. The 1996 Directive, like its predecessors, is based on the recommendations of the International Commission on Radiological protection (ICRP): see recital 6 of the 1996 Directive (referring to ICRP 60) and *Re Ionising Radiation Protection* [1992] ECR.⁷ The system of radiological protection recommended by the ICRP has three general principles. The first is justification of practices – which is the principle relevant to the legal challenge to the MOX decision. The other two, for completeness, are optimisation of protection (keeping exposure as low as reasonably achievable – ALARA) and the specification of dose limits.
11. A key legal point is that the October 2001 decision of the Secretaries of State was based on a view (not disputed by any of the parties to the subsequent legal challenge) that the 1996 Directive introduced a different legal test to the application of the justification principle than that contained in the 1980 Directive, as interpreted by Potts J. in *R v Secretary of State for the Environment and others ex parte Greenpeace and others*. Article 6 of the 1996 Directive was interpreted as being concerned with a generic approach to a type of activity and not with a site-

7. In *Re Ionising Radiation Protection*, the European Court of Justice (ECJ) expressly recognised that the standards laid down in Directive 80/836/Euratom were based on the published recommendations of the ICRP, though in that case the ECJ, when considering the principle of dose limitation, decided that the Directive imposed a minimum level of protection – thereby allowing member states to adopt more stringent dose limits than those required by the Directive if they so wished.

specific justification. The way in which the October 2001 decision document was worded and structured reflected this. The focus was on the justification of the manufacture of MOX fuel, rather than the justification of SMP (the particular plant). However, the economics of SMP were not irrelevant. The general conclusions of the Secretaries of State regarding MOX manufacture were “in part informed by, and ...tested against, their consideration of the specific prospects of the SMP.”

12. It is instructive to consider particular extracts from the October 2001 decision of the Secretaries of State:

“71. In applying the generic test for justification explained above, the Secretaries of State consider that an important factor to be taken into account is the economic benefits to be derived from the particular class or type of practice in question: here the manufacture of MOX fuel...

73. The Secretaries of State consider that, as a result, the manufacture of MOX fuel carries economic benefits which are capable of justifying it as a class or type of practice. Overall the Secretaries of State consider that, given the ability to carry on that type of practice with very minor radiological detriments, the economic benefits are sufficient to justify it.

74. This general conclusion of the Secretaries of State has in part been informed by, and has been tested against, their consideration of the specific prospects of the SMP. They have consulted on BNFL’s business case for SMP and are satisfied that the operation of the SMP will provide significant economic benefits. This supports their conclusion that the class or type of practice comprising the manufacture of MOX fuel is justified on application of the generic test by the economic benefits it makes it possible to achieve...

86. In assessing the economic issues and the NPV of operating SMP, the Secretaries of State consider that it is appropriate and consistent with the justification test in the 1996 Directive to focus on the present circumstances, both on the costs of operating the SMP in future and on the present assessment of the commercial opportunities. *The Secretaries of State do not consider it appropriate to deduct BNFL’s sunk costs from the consultants’ calculation of the NPV of the SMP...*” (emphasis supplied).

13. The fact that the Secretaries of State ignored the sunk costs of SMP when assessing whether MOX manufacture was justified provided Greenpeace and Friends of the Earth (the claimants) with the strongest basis of their legal challenge, as the arguments developed.

The Legal Challenge in the High Court

14. As stated, the legal challenge being brought was by way of a judicial review – in general terms this involves the court reviewing the decision and considering whether it ought to be set aside on grounds of unlawfulness.⁸ The respondents to the action were, therefore, the Secretaries of

8. There are important limits to the availability of judicial review. Note in particular that in relation to a challenge concerning the application of the justification principle to decisions of the EA regarding disposals of radioactive waste from military installations, the Court of Appeal has recently held that the law of England does not allow courts to look into the merits of any honest decision of government upon matters of national defence policy. Further, the EA acted correctly in treating criticisms of the UK’s

State as the decision-makers. BNFL was involved (and represented) as an “interested party”: the case is *R v Secretary of State for the Environment, Food and Rural Affairs and the Secretary of State for Health ex parte Greenpeace and Friends of the Earth and others*.⁹ In the High Court, the claimants initially raised three arguments as to why the decision should be quashed: (i) sunk costs should not be ignored when applying the justification test in the 1996 Directive; (ii) there was an absence of adequate evidence or intent on the part of Japanese customers to enter into contracts with BNFL ; and (iii) the government had failed to disclose an internal departmental analysis of the reasons for decision. In the end, (ii) and (iii) were abandoned without being argued, so the only issue remaining in the High Court and subsequently in the Court of Appeal was that of sunk costs.

15. The judge in the High Court (Collins J.) described the claimants’ basic submission as “beguilingly simple”, and described the submission as follows:

“It is common ground that the manufacture of MOX fuel is a new type of practice and so covered by Article 6.1 [of the 1996 Directive]. In deciding what are the economic benefits of the new type of practice, it is necessary to include the costs of enabling it to come into being. It cannot be carried out in the abstract. It cannot be right that the timing of the application for authorisation will determine that cost, it being apparently accepted that any cost to be incurred after the application is made is to be included. This would mean that the applicant could improve his chances of establishing economic benefit by waiting until enough has been expended, which will be ‘sunk’. So that little remains to affect the likely economic benefits resulting from the type of practice...Furthermore, the Directive presupposes a uniform implementation in Member States ...and that is only achieved if there is a uniform approach adopted to assessing economic benefit. It is not in the circumstances of radiological protection a case of choosing next steps on what may be described as a corporate finance basis but of acting as an environmental regulator applying an objective test of justification to all its costs.”¹⁰

16. Although Collins J. was “initially impressed and even beguiled” by the claimants’ argument, he rejected it. He gave two reasons why the claimants’ application failed. The first reason was based on the judge’s own reasoning, rather than submissions from the respondent and interested party. He held that “the costs included in setting up a particular plant to enable the type of practice to be put into effect is not to be set against economic benefits”. In reaching this conclusion, the judge was clearly seeking to avoid the situation where the time at which the decision as to justification was made would influence the economic assessment: “...assessment of economic benefit should not be influenced by the time at which the application or assessment is made.”¹¹ Excluding the capital costs of constructing a particular plant would mean, of course, that the question of whether sunk costs are included or excluded is by-passed – all capital costs involved in constructing a particular plant would be excluded. Collins J. found the justification for this approach by concluding that “what is needed is a justification of a type of a practice”.

independent nuclear deterrent as outside its remit and regarding the relevant nuclear weapons system as a benefit for the purposes of the justification principle – see *Emanuela Marchiori v the Environment Agency and the Secretary of State for Defence*, Court of Appeal, judgement 25 January 2002.

9. unreported – Case No. 4012/2001. The case was heard on 8 and 9 November 2001. The approved Judgement of Mr. Justice Collins was handed down on 15 November 2001 (transcript available).
10. *Ibid.* at paragraph 14.
11. *Ibid.* at paragraph 19.

Given that capital costs involved in enabling the activity to go ahead will vary from site to site, it followed (according to Collins J.) that neither site specific capital costs nor any costs “peculiar to the site” were costs which could truly be said to be included in the practice itself. It can be appreciated that this reasoning – excluding all capital costs (not just sunk capital costs) – might be regarded as quite radical.

17. Perhaps recognising that the first of his reasons might be arguable, Collins J. gave a second reason for rejecting the claim (indeed the judge said that he was doing this in case his first reason for rejecting the claim was wrong). Both the respondent and the interested party had each made a submission to the effect that ignoring sunk costs was consistent with ‘classic’ economic theory and the Secretaries of State could not be faulted for applying that approach. The learned judge set out the submission as follows:

“That it cannot be wrong for the Secretaries of State to adopt a proper, indeed a classic, economic approach to sunk costs. There is nothing in Article 6.1 which in terms supports [the claimants’] construction and nothing is said in Article 6.1 itself or in any domestic legislation about when an application should be made, other than that it must obviously be in advance of the adoption or approval of the type of practice in question... Since bad faith is not suggested, the time at which the application is made cannot be held against BNFL and so the usual principle [of ignoring sunk costs] ought to be applied. Accordingly no error of law has been established in the approach taken by the Secretaries of State.”¹²

18. Collins J. simply said, following his summary of the submission quoted above, that “That submission is in my view correct.”¹³ Accordingly the claimant’s claim failed. However, they quickly lodged an appeal.

The Legal Challenge in the Court of Appeal

19. In the Court of Appeal (see *Nuclear Law Bulletin* No. 69) the appellants’ argument focused on two main points. The first was essentially a re-run of the argument in the High Court, namely that the decision whether or not to approve a new practice ought not to depend upon when, in relation to the expenditure of capital costs, the decision is taken. The second argument, however was new and potentially more incisive. This argument was that on a generic approach to justification, it is impermissible to ignore the sunk costs of a particular plant since the decision will apply generally and permit the practice to be carried on at other plants whose capital costs would not be sunk.
20. The Court of Appeal rejected the first ground of Collins J.’s decision. The Court of Appeal said that that ground was not easily supportable – it could not reasonably be suggested that the whole of the capital costs – expended and unexpended – of the project should simply be ignored when considering the justification of a practice. In this situation, Counsel for BNFL put forward two arguments to counter those put by the appellants: (i) that sunk costs should always be ignored in line with classic economic theory (this was the submission that formed the second ground of the decision of Collins J.); and (ii) that since in reality SMP is the only plant contemplated for

12. Ibid. at paragraph 21.

13. Ibid.

MOX manufacture in the UK – a fact supported by the October 2001 decision document¹⁴ – the generic nature of the justification test with regard to sunk costs is immaterial in the present context. The approval would not result in other MOX plants being constructed whose capital costs had not been taken into account. In the words of BNFL’s Counsel, “MOX manufacture at SMP is in reality the only game in town and to refuse it on the basis that approval would apply to the practice generally would be absurd.”

21. With regard to the first part of the submission on behalf of BNFL (that sunk costs must be ignored), Lord Justice Simon-Brown said that this was “straightforward and to my mind entirely convincing.”¹⁵ The judge went on to say that, “There is nothing in Article 6 which requires the Secretaries of State in reaching their decision to disapply standard economic principles including that of ignoring sunk costs. Nor would it make any sense for them to do so.”¹⁶
22. With regard to the second part of the submission made on behalf of BNFL (that the generic approach to justification should not affect the standard economic approach of ignoring sunk costs in a situation where no other plant but the one under consideration is contemplated), Lord Justice Simon-Brown found this to be “Once again entirely convincing.” Lord Justice Simon Brown in a key passage dealing with this point said:

“It cannot in my judgement be said that the Secretaries of State were bound to take into account costs which had been incurred in constructing SMP, which plainly cannot be recovered, and which were plainly not going to be incurred anywhere else. Secretaries of State are entitled to decide these cases in the real world. To bring into account sunk costs on a fictional basis that the equivalent costs would be incurred were the approval to be invoked to operate the practice elsewhere in the future would be absurd. It would be to sacrifice reason on the altar of blind theory. I cannot accept that Article 6 on its true construction requires such an economically nonsensical approach”.¹⁷

23. This brought to a conclusion the challenge in the English courts to the bringing of SMP into operation. In December 2001, the UK Nuclear Installations Inspectorate issued a formal consent under the Nuclear Installations Act 1965 for plutonium to be introduced into the plant, and that decision was not challenged. Accordingly MOX manufacture in the UK is now justified under EU law, and SMP is operational.¹⁸ Perhaps the most remarkable thing about the challenge in the UK courts is that despite the fact that the October 2001 decision document, and the decision-making process which took several years, covered many complex subjects and issues –

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14. Paragraph 25 of the decision document stated that “Although the provisions of the 1996 Directive require a generic assessment to be carried out, it should be borne in mind that BNFL is the only manufacturer of MOX fuel in the UK and that this is likely to continue to be the case for the foreseeable future. In addition, BNFL intends to produce MOX fuel only at the SMP.”
 15. See *R v Secretary of State for the Environment, Food and Rural Affairs ex parte Greenpeace and another*. The Court of Appeal heard the appeal on 27 and 28 November 2001 and delivered its judgement on 7 December 2001.
 16. Approved transcript of Court of Appeal judgement, at paragraph 37.
 17. *Ibid.* at paragraph 47.
 18. Note, however, that there were certain restrictions built into the October 2001 decision regarding the “sources” of plutonium which can be utilised in SMP. Subject to specific exceptions, the plutonium used in SMP to manufacture MOX fuel must belong to foreign customers and have been recovered in THORP. The utilisation of Magnox plutonium, for example, will require notification and clearance from the relevant Secretaries of State.

environmental discharges, environmental impact, radiological effects, including possible health effects, operational safety, economics, international markets for MOX, transportation, security and so on – in the end the challenge focused on just a single economic issue, the question of sunk costs. With regard to that challenge it would be wrong to conclude that the judgement of the Court of Appeal holds that sunk costs may be ignored when conducting a justification exercise – the decision that sunk costs could properly be disregarded in the economic assessment of MOX manufacture in the UK was clearly restricted to a situation where the generic practice in question would be confined to the operation of a single plant.

24. Neither should it be assumed that the SMP judicial review has brought to an end questions or issues or challenges which might be raised concerning the principle of justification. Indeed, there are many difficult questions remaining. For example, what amounts to a new generic practice? Would a new type of reactor system be a new practice? If (unlike the case with MOX manufacture in the UK) a certain number of particular installations are planned or foreseeable and some costs have been expended prior to a decision on justification having been taken, how should the sunk costs be taken into account in relation to the generic practice? If existing practices have not been justified (and many existing practices will not have been subjected to a formal justification exercise), is there a legal requirement for them to be justified as new practices? Question such as these may well give rise to further legal challenges in the future. This risk might be reduced, and greater certainty achieved, by the provision of governmental (or Community) guidance on practical questions relating to the application of the justification principle to new and existing generic practices.

United States

Ruling of the US Court of International Trade in relation to the sale of uranium enrichment services in the United States (2003)

The US Court of International Trade (CIT)¹⁹ ruled on 25 March 2003 in favour of European uranium enrichment companies in a long-standing legal argument relating to the sale of enrichment services in the United States.

The US Department of Commerce (DOC) made a preliminary determination in 2001 that countervailing and antidumping duties should be imposed on exports of low enriched uranium (LEU) carried out by the European enrichment companies Urenco and Eurodif (see *Nuclear Law Bulletin* No. 68). The US International Trade Commission confirmed the conclusions of the DOC on 21 January 2002 (see *Nuclear Law Bulletin* No. 69), authorising the DOC to impose such duties.

Urenco and Eurodif asserted in this appeal before the CIT that the antidumping and countervailing duty laws do not apply to certain uranium enrichment transactions because the contractual arrangements involve purchases of enrichment services, rather than purchases of LEU as merchandise, and services fall outside the scope of the antidumping and countervailing duty laws. The CIT has remanded the case to the DOC requesting that, within 75 days, the department reconsider its decision to impose such duties, on grounds that the decision was “unsupported by substantial

19. The US Customs Courts Act of 1980 clarified and expanded the status, jurisdiction, and powers of the former United States Customs Court and changed the name of the court to the United States Court of International Trade. The CIT is responsible for judicial review of civil actions arising out of import transactions and federal statutes affecting international trade.

evidence” and “not in accordance with law”. The court stated that US trade laws did not cover the sale of enrichment services, but only the sale of enriched uranium products. The CIT’s decision does not reverse the DOC’s final determination nor any of the countervailing or antidumping duties, which remain in effect.

This ruling is available on the Web at the following URL:
[www.cit.uscourts.gov/slip_op/Slip_op03/SlipOp03-34\(Public\).pdf](http://www.cit.uscourts.gov/slip_op/Slip_op03/SlipOp03-34(Public).pdf)

European Union

*Commission v Council – Accession of the Community to the Convention on Nuclear Safety (2002)**

On 11 December 2002, the Court of Justice of the European Communities handed down an important judgement¹ concerning the competence of the European Atomic Energy Community (hereinafter referred to as the “EAEC” or “Euratom Community”) to accede to the Convention on Nuclear Safety² (hereinafter referred to as “the Convention”). In this judgement, the Court, in line with the conclusions of the Advocate General,³ granted to a large extent the Commission’s request and confirmed the shared competences of the Euratom Community in the field of nuclear safety.

Together with its decision⁴ approving the accession of the Euratom Community to the Convention, the Council had adopted a declaration, annexed to that decision, in which it declared, in application of the Convention,⁵ that the Euratom Community possesses competence in the fields covered by Articles 15 and 16(2) of the Convention and that thus such competence does not extend to Articles 1 to 5, 7, 14, 16(1) and (3) and 17 to 19 of the Convention. The Council was of the opinion that the Member states alone possessed competence in respect of these provisions. Without contesting the actual accession to the Convention, the Commission brought an action before the Court for partial annulment of this annexed declaration, on the grounds that this declaration of competences appeared too restrictive.

Having dealt with the question of the admissibility of the action, the Court examined the question whether the Council is obliged to provide the International Atomic Energy Agency with a

* This note on case law has been kindly prepared by Mr. André Bouquet, Member of the Legal Service of the European Commission. Responsibility for the ideas expressed therein remains solely with the author and they do not commit the European Commission or its Legal Service.

1. Judgement of 11 December 2002, Case C-29/99, *Commission v Council*, not yet published in the ECR (available on the Web at <http://curia.eu.int/en/content/juris/index.htm>).
2. Convention on Nuclear Safety adopted on 17 June 1994, IAEA Document INFCIRC/449 (available on the Web at www.iaea.org/worldatom/Documents/Infcircs/2000/infcirc449a3.pdf).
3. Conclusions of Advocate General Jacobs of 13 December 2001, Case C-29/99, *Commission v Council*, not yet published in the ECR (available on the Web at <http://curia.eu.int/en/content/juris/index.htm>).
4. Decision of 7 December 1998, unpublished. The declaration is cited at paragraph 34 of the judgement and was published by the IAEA in INFCIRC/449/Add. 3 (available on the Web at: www.iaea.org/worldatom/Documents/Infcircs/2000/infcirc449a3.pdf).
5. Article 30(4)(iii) of the Convention provides that when becoming party to the Convention, an organisation to which this option is available (such as the Euratom Community) shall communicate to the Depositary a declaration indicating which States are members thereof, which articles of this Convention apply to it, and the extent of its competence in the field covered by those articles.

complete declaration of competences. The Court considered this issue both in relation to the other Parties to this Convention and in respect of co-operation between Community institutions, and concluded in the affirmative: “ When it approves accession to an international convention without any reservation, the Council must respect the conditions for accession laid down by that convention, since an accession decision which did not comply with those conditions would be in breach of the Community’s obligations from the moment it entered into force. In addition, it follows from the duty of sincere co-operation between the institutions (see, *inter alia*, Case C-65/93 Parliament v Council [1995] ECR I-643, paragraph 23) that the Council decision approving accession to an international convention must enable the Commission to comply with international law. In the present case, Article 30(4)(iii) of the Convention must, in the interest of the other contracting parties, be interpreted to mean that the declaration of competences under that provision must be complete. It follows from the foregoing that the Council was, under Community law, required to attach a complete declaration of competences to its decision approving accession to the Convention”.⁶

In its examination of the competences of the Euratom Community in respect of “nuclear safety”, the Court ruled that as the Euratom Treaty does not contain a specific title relating to nuclear safety, the question therefore falls to be examined under Chapter 3 on Health and Safety.⁷ The Court explained that this Chapter is based on two objectives: 1) to establish uniform safety standards to protect the health of workers and of the general public; and 2) to ensure that they are applied.⁸ Such protection “cannot be achieved without controlling the sources of harmful radiation”.⁹ In its interpretation of this Chapter, the Court refused to “draw an artificial distinction between the protection of the health of the general public and the safety of sources of ionising radiation”.¹⁰

Within the competences examined by the Convention, the fact that competences are shared in respect of Articles 15 (radiation protection) and 16(2) (radiological emergency)¹¹ was not contested.

With regard to Articles 1 to 3 of the Convention (objectives, definitions and scope of application), the Court ruled that these provisions create neither rights nor obligations, and therefore the question of competence does not arise in their regard.¹² Articles 4 and 5 of the Convention (implementing measures and reporting) are of an excessively general scope and therefore it is only on specific subjects (to which implementing measures and reporting apply) for which they are competent that organisations are required to make a declaration of competences in application of Article 30(4)(iii) of the Convention. Consequently, the Court accepted that the Council omitted these provisions from the declaration of competences¹³ and rejected the application in this respect.

In relation to Article 7 of the Convention (legislation and regulatory framework governing safety), the Court stated “Even though the Euratom Treaty does not grant the Community competence to authorise the construction or operation of nuclear installations, under Articles 30 to 32 of the Euratom Treaty the Community possesses legislative competence to establish, for the purposes of

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6. Paragraphs 68 to 71 of the judgement.
 7. Paragraph 74 of the judgement.
 8. Paragraph 76 of the judgement.
 9. Paragraph 76 of the judgement.
 10. Paragraph 82 of the judgement.
 11. Paragraph 72 of the judgement.
 12. Paragraphs 84 and 85 of the judgement.
 13. Paragraphs 86 and 87 of the judgement.

health protection, an authorisation system which must be applied by the Member States. Such a legislative act constitutes a measure supplementing the basic standards referred to in that article.”¹⁴ The Court refused to make an exception for Article 7(2)(i) (national requirements and regulations) in respect of which the Council claimed that the exclusive competence of the Member States was even more evident, pointing out that “under Article 30(4)(11) of the Convention, regional organisations must, in matters within their competence, fulfil the responsibilities which the Convention attributes to the Member States”.¹⁵ Basing itself respectively on the competences set out in the second paragraph of Article 3 (recommendations to ensure compliance with the basic standards) and Article 35 (facilities to carry out continuous monitoring of the level of radioactivity) of the Euratom Treaty, the Court ruled that there is a certain Community competence in the field covered by Article 14(i) (safety assessment) and (ii) (safety verification) of the Convention.¹⁶ The Court therefore confirmed that the Community competence does not necessarily have to be of a binding nature:

“Article 4 of the Convention provides that the obligations which it imposes on the contracting parties may be implemented not only by means of legislative and regulatory measures, but also by administrative measures and other steps. The application of the Convention may therefore call for measures which are not mandatory for those to whom they are addressed, such as recommendations. In those circumstances, the competence transferred to the Commission to make recommendations to the Member States in the field covered by Article 14(i) of the Convention should have been taken into account and that provisions should have been referred to in the declaration indicating the Community’s competences”.¹⁷

As far as Article 16(1) of the Convention (emergency preparedness for nuclear installations) is concerned, the Court concluded that competence arises due to the fact that the basic standards (Articles 30 and 32 of the Euratom Treaty) can include standards for emergency measures, thereby implying that Member States may be required to draw up plans laying down such measures in respect of nuclear installations.¹⁸ The Court rejected the Council’s claim that Article 16(3) of the Convention (emergency plans for Parties without nuclear installations) could not concern the Euratom Community, given that there are reactors on its territory, by emphasising that the Community includes Member States which do not have any nuclear reactors.¹⁹ As regards Article 17 (siting), the Court bases its finding on the premise that “the siting of a nuclear installation... necessarily includes taking into account factors relating to radiation protection, such as the demographic characteristics of the site”,²⁰ in order to link this provision of the Convention with Commission competence to provide an opinion under Article 37 of the Euratom Treaty “relating to any plan for the disposal of radioactive waste in whatever form”.²¹ For Articles 18 (design and construction) and 19 (operation) of the Convention, the Court used the same reasoning as for Article 14, resulting in the Community

14. Paragraph 89 of the judgement.

15. Paragraph 90 of the judgement

16. Paragraphs 92 to 96 of the judgement.

17. Paragraph 95 of the judgement.

18. Paragraph 97 of the judgement.

19. Paragraphs 98 to 100 of the judgement.

20. Paragraph 102 of the judgement.

21. Note by the translator: it should be noted that in French, the provision refers to any emission of radioactivity “tout projet de rejet d’effluents radioactifs” and not merely to waste disposal.

competence to make recommendations under the second paragraph of Article 33 of the Euratom Treaty.²²

Consequently, as well as those provisions already cited [Articles 15 and 16(2)], these provisions [Articles 7, 14, 16(1) and (3) and 17 to 19] of the Convention should have been included in the Community competences (shared with the Member states) in the Council's declaration of competences. The Court therefore granted the Commission's request on these points and partially annulled the declaration.²³

This judgement is consistent with previous decisions of the Court of a clearly "community" nature in the Euratom field, such as the rulings concerning the applicability of Chapter 6,²⁴ supply policy,²⁵ or the imposition of sanctions in relation to safeguards (Chapter 7)²⁶ or the Ruling on the Convention on the Physical Protection of Nuclear Materials.²⁷

At the end of 2002 and in early 2003, the Commission adopted a package of legislative proposals in the field of nuclear safety²⁸ which will be discussed in the Council. In these proposals, the Commission underlines the importance of the judgement of 11 December 2002 in a wider respect than simply in relation to the operation of the Convention on Nuclear Safety, as the basis of a "Community approach to safety". At the present time, it is somewhat premature to offer substantive comment on

22. Paragraph 105 of the judgement.

23. At the time of writing (May 2003), the declaration available on the IAEA Web site is still the partially annulled original declaration (www.iaea.org/worldatom/Documents/Infcircs/2000/infcirc449a3.pdf).

24. Judgement of the Court of 14 December 1971, Case 7-71 Commission v France [1971] ECR 1003, with the conclusions of Advocate General Roemer presented on 18 November 1971.

25. Judgement of the Court of 22 April 1999, Case C-161/97 Kernkraftwerke Lippe-Ems GmbH v Commission [1999] ECR I-2057, with the conclusions of Advocate General Léger presented on 19 November 1998. See also the judgement of the Court of 11 March 1997, Case C-357/95 P Empresa Nacional de Urânio SA (ENU) v Commission [1997] ECR I-1329, with the conclusions of Advocate General Fennelly presented on 5 December 1996. These two judgements rejected the appeals lodged against the judgement of the Court of First Instance of 25 February 1997, Joint Cases T-149/94 and T-181/94 Kernkraftwerke Lippe-Ems GmbH v Commission [1997] ECR II-161, and against the judgement of the Court of First Instance of 15 September 1995, Joint Cases T-458/93 and T-523/93 Empresa Nacional de Urânio SA (ENU) v Commission [1995] ECR II-2459. These judgements were described in *Nuclear Law Bulletin* Nos. 55, 56, 58, 59 and 65.

26. Judgement of the Court of 21 January 1993, Case C-308/90 Advanced Nuclear Fuels GmbH v Commission [1993] ECR I-309, with the conclusions of Advocate General Jacobs presented on 19 November 1992.

27. Ruling of the Court of 14 November 1978, Draft IAEA Convention on the protection of nuclear material, installations and transport, Ruling 1/78 [1978] ECR 2151.

28. Commission Documents COM(2003)32 final of 30 January 2003 (legislative proposals for a Directive setting out basic obligations and general principles on the safety of nuclear installations and a Directive on the management of spent nuclear fuel and radioactive waste) and COM(2002)605 final of 6 November 2002 (Communication to the Council and the Parliament on nuclear safety within the European Union). The complete file, with the press release, an explanatory note, a Communication from the Vice President of the Commission Mrs. de Palacio, the Communication from the Commission to the Council and the Parliament and the legislative proposals themselves are available on the Web site of the Directorate-General for Energy and Transport of the Commission (where all Commission activities in the safety field are set out in detail): <http://europa.eu.int/comm/energy/nuclear/nuclearsafety.htm>.

these proposals; however it will be very interesting to return to this subject at a future date, to examine the results of these important discussions.

ADMINISTRATIVE DECISIONS

Netherlands

Governmental decision not to appeal court ruling on the continued operation of the Borssele NPP (2002)

In November 2002, the Dutch government confirmed that it will not challenge the court ruling in favour of the continued operation of the Borssele NPP (see *Nuclear Law Bulletin* Nos. 65, 66 and 68). The former Dutch government had sought to shut down the plant at the end of 2003. A request by the Dutch Green Party for a further appeal was rejected by the Ministry of Housing, Spatial Planning and the Environment. The reactor can now continue operating until at least 2013.