CASE LAW AND ADMINISTRATIVE DECISIONS

CASE LAW

Slovak Republic

Judgement concerning the right of the Nuclear Regulatory Authority to deny information classified as a commercial secret from requests for public information (2003)

Based on Act 211/2000 Coll. on free access to information, Greenpeace requested, in June 2002, that the Slovak Republic Nuclear Regulatory Authority (NRA) provide information included in its Safety Reports concerning, *intra alia*, an analysis from the project on the reconstruction of the V-1 Bohunice Nuclear Power Plant. Specifically, Greenpeace asked for the final thermal and hydraulic analysis of the main circulation pipe rupture (2Xdn 500), calculated on the realistic-approach basis, including the methods of calculations.

Pursuant to Article 10 of Act 211/2000 Coll., any information classified as a commercial secret shall not be made available to the public. On the basis of this provision, the Nuclear Regulatory Authority withheld the requested information. Greenpeace filed a complaint against this refusal to comply with its information request. In response to the complaint, the Head of the Nuclear Regulatory Authority conducted a second-instance proceeding and confirmed the first-instance decision not to make the requested information available, due to it being classified as a commercial secret of the owner – the Slovak Electricity Company (SE), a.s.

Greenpeace subsequently filed a suit with the Supreme Court of the Slovak Republic in October 2002, seeking judicial review of the above-mentioned decision. The suit was based particularly on the grounds that the Nuclear Regulatory Authority failed to examine all objective and subjective criteria of commercial secrets as required by the Commercial Code and that the information concerned could not, in any case, be classified as a commercial secret.

In its response to the suit, the NRA answered that according to Act 211/2000, Article 10, information classified as a commercial secret should not be made available by the person in charge of furnishing information. Further, it argued that it was not within the NRA's competence to judge whether all conditions required by civil and commercial law regarding commercial secrets had been complied with in its determination that the requested information was, in fact, a commercial secret.

On 25 March 2003 the Supreme Court held a hearing in this case and ruled in favour of the NRA, upholding the decision to not provide Greenpeace with the requested information. The written decision was served on 20 May 2003. Within the time prescribed by law, Greenpeace appealed the court's decision and the NRA responded to the appeal on 4 July 2003. On 23 October 2003, the

Supreme Court heard Greenpeace's appeal, but confirmed the judgement in its first instance, denying Greenpeace access to the requested information.

Sweden

Judgement of the Göta Court of Appeal on negligent violation of the Swedish Act on Nuclear Activities (2003)

On 28 August 2001, the Chief District Prosecutor in Kalmar charged two employees at the Oskarshamn Nuclear Power Plant (OKG) with negligent violation of the Swedish Act on Nuclear Activities (see *Nuclear Law Bulletin* Nos. 31 and 33; the text of this Act is reproduced in the Supplement to *Nuclear Law Bulletin* No. 33). These charges followed an incident in the fall of 1996, related to the restart of one of the reactors after an overhaul-shutdown.

According to the technical specifications for reactor operation after shutdown at OKG, Security-system 323 – a sprinkler system for emergency cooling of the reactor core – should be in operation before the reactor is restarted. During overhaul, Security-system 323 had been disconnected because an unexpected start of the sprinkler system would have disrupted the maintenance work and caused danger to workers. One of the indicted, a control room technician, was undertaking restoration measures related to the restart of the reactor. At the time that he started his shift on 30 October 1996, certain reconstruction measures were still incomplete and work was taking place inside the containment. For this reason the control room technician decided not to close certain ventilators (system 741) in order to prevent the oxygen content inside the containment from becoming too low for the people working there. He also decided not to close the disconnectors to the sprinkler system (system 323), to prevent them from activating during the ongoing work. The technician made a note of the measure concerning system 741 in a logbook that was to be handed over to the next shift. However, he did not make any note concerning the disconnectors in system 323. Instead, he wrote his signature in the work-instruction, indicating that the disconnectors actually had been closed. The control room technician took these measures after consulting his closest superior, the deputy Operative-Engineer, who was also charged. Neither of the latter subsequently checked that the disconnectors to the sprinkler system actually had been closed. As a consequence of this, the Security-system 323 was not activated at the restart of the reactor on 5 November 1996. The discrepancy from the operating rules was discovered at a routine control on 13 November 1996.

At trial the control room technician and the deputy Operative-Engineer stated that they had believed and relied on the existence of another security instruction ("control before start"). They claimed to have been certain that this instruction would cover checking system 323 before the reactor re-start. This assumption later proved, however, to be incorrect.

According to Swedish legislation it is considered a crime to deliberately or negligently cause infringements of regulations or operation-conditions based on the Swedish Act on Nuclear Activities (1984:3). Penalties are not issued, however, for insignificant infringements.

The Prosecutor argued that the control room technician and the deputy Operative-Engineer were guilty of negligence as they failed to make sure that the disconnectors to the sprinkler system were closed before restart of the reactor. In the Prosecutor's view they should have at least informed the next work-shift that the disconnectors were open. The District Court of Oskarshamn, however, came to the opposite conclusion. In its ruling of 30 April 2002, the Court emphasised that the conditions were extraordinary due to the fact that there was work going on in the containment at the same time as

restoration measures were being undertaken. These circumstances had not been foreseen in the operation instructions and led, according to the Court, to uncertainty of how to handle the situation. Taking into account the time schedule that the indicted were working under, the Court reached a non-guilty verdict in both cases.

An appeal was submitted on behalf of the Prosecutor to the Göta Court of Appeal, which confirmed in its ruling of 26 March 2003 (case B 621-02), that the control room technician was not to be held responsible for the infringements. According to the Court it followed from common criminal law principles that a person in the control room technician's position could not bear criminal responsibility for measures that the law imposes on a company. Such responsibility requires the existence of a clear and explicit delegation of power. The Court held, however, that the deputy Operative-Engineer had such a clear and explicit delegation of power that he qualified for criminal responsibility on behalf of his company. The Court also held that he had deliberately neglected a measure prescribed in the instructions and despite this allowed the control room technician to leave his signature. Further, the deputy Operative-Engineer neglected to ensure that the next work-team was informed about the situation. The Göta Court of Appeal concluded that his negligence had caused the reactor to be taken into operation in deviance with the regulations. The Court sentenced the deputy Operative-Engineer to pay a low-level fine, taking account of the tight schedule and that the particular situation had not been foreseen in work instructions.

Permanent Court of Arbitration

*Ireland vs. United Kingdom (the OSPAR Arbitration)(2003)**

Introduction

1. In October 2001 the Secretary of State for the Environment, Food and Rural Affairs and the Secretary of State for Health ('the Secretaries of State') decided that the manufacturing of mixed oxide fuel ('MOX') in the United Kingdom was "justified" in accordance with 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, thereby allowing British Nuclear Fuels ('BNFL') to commence the plutonium commissioning of its Sellafield MOX plant ('SMP').[1] This decision led to a legal challenge by environmental pressure groups in the English courts by way of a judicial review in an attempt to have the decision of the Secretaries of State set aside. This challenge failed, at first instance and on appeal[2] (see *Nuclear Law Bulletin* No. 71).

2. However, even before the judicial review challenge had been launched in the English courts, Ireland had initiated two sets of international arbitration proceedings against the United

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1. Consent was also required – and obtained – from the UK's nuclear regulator – the Nuclear Installations Inspectorate.

2. See *Regina (on the application of Friends of the Earth) vs. Secretary of State for the Environment, Food and Rural Affairs*, [2002] Env LR 612, CA.

Kingdom in relation to SMP. The first of these claims was made under the Convention for the Protection of the Marine Environment of the North-East Atlantic ('the OSPAR Convention')[3] and has now been decided. The second was made under the United Nations Convention on the Law of the Sea (UNCLOS) and was accompanied by a request for provisional measures which was subsequently adjudicated upon by the International Tribunal of the Law of the Sea ('ITLOS').[4] However, the UNCLOS proceedings on jurisdiction and the merits of the case are currently suspended, a decision which led Ireland to make a fresh application for provisional measures.[5] This note reports on the outcome of the OSPAR arbitration; it is hoped to provide an account of the UNCLOS proceedings in a future case note.

Events Leading to the Initiation of the OSPAR Arbitration

3. As part of the 'justification' decision-making exercise conducted in relation to MOX manufacture, two reports on the economic and commercial case for SMP were produced by independent consultants: a report by PA Consulting Ltd ('the PA report') and (subsequently) a report by A.D. Little ('the ADL report'). These reports were (together which a great deal of information concerning the environmental impact of SMP) put into the public domain as part of the public consultation process, but with commercially confidential information omitted (redacted). Although Ireland made detailed representations to the United Kingdom during the consultation process, Ireland contended that the United Kingdom was obliged to make the information redacted from the PA Report available under Article 9 of the OSPAR Convention. The United Kingdom rejected this contention on the basis that it wished to preserve the commercial confidentiality of the information. On 15 June 2001 Ireland requested that an arbitral tribunal be constituted under Article 32 of OSPAR to determine its dispute with the United Kingdom concerning the United Kingdom's refusal to make available information redacted from the public domain versions of the PA report. A statement of claim was also filed. This was subsequently amended to the effect that the United Kingdom was also obliged to make available the information omitted from the published version of the ADL report (which the United Kingdom also declined to provide to Ireland).

4. An arbitral Tribunal was established, consisting of three distinguished arbitrators.[6] Rules of procedure were adopted and timetable was set for submissions and the Hearing. Written pleadings were filed by the Parties between March and August 2002, and the Hearing took place

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3. The OSPAR Convention was opened for signature on 22 September 1992 and entered into force on 25 March 1998. Both the United Kingdom and Ireland are Contracting Parties.

4. The provisional measures application was heard by ITLOS in Hamburg on 19/20 November 2001. ITLOS declined to give Ireland the provisional measures it was requesting. However, ITLOS did issue an Order requiring the Parties to co-operate in exchanging information concerning risks or effects of the operation of the MOX plant (see *Nuclear Law Bulletin* No. 69).

5. On 24 June 2003, the UNCLOS arbitral Tribunal (established under Annex VII of UNCLOS), after two weeks of hearings at the Peace Palace in the Hague, issued Order No. 3 – Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional Measures. The suspension was ordered because of the Tribunal considered that there were substantial doubts (raised by the United Kingdom) as to whether the jurisdiction of the UNCLOS Tribunal could be firmly established in respect of all or any of the claims in the dispute. The Tribunal did not grant any of the provisional measures requested by Ireland but (in brief) recommended that the Parties seek to establish better secure inter-governmental arrangements and review such arrangements.

6. Professor W. Michael Reisman (Chairman), Dr. Gavan Griffith QC and Lord Mustill PC.

at the Peace Palace in The Hague from 21 to 25 October 2002. The Tribunal's decision (final award) was issued on 2 July 2003.[7]

Claims and Submissions of the Parties

5. Ireland, in its Memorial, requested full disclosure of the two consultants' reports in order to be in a better position to consider the impact which the commissioning of the MOX plant (SMP) would or might have on the marine environment and to be able to assess the extent of the compliance by the United Kingdom with its obligations under the OSPAR Convention, UNCLOS and various provisions of European Community law. Ireland requested the Tribunal to declare that the United Kingdom was in breach of Article 9 of the OSPAR Convention by refusing to make available information deleted from the PA and ADL reports. An order was sought requiring the United Kingdom to provide Ireland with a complete copy of both the PA report and the ADL report, or alternatively a copy of those reports which included all such information as the Tribunal considered would not affect commercial confidentiality within the meaning of Article 9(3)(d) of the OSPAR Convention.

6. The relevant provisions of Article 9 of OSPAR provide:

> "Access to Information
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> 1. The Contracting Parties shall ensure that their competent authorities are required to make available the information described in paragraph 2 of this Article to any natural or legal person, in response to any reasonable request, without that person's having to prove an interest, without unreasonable charges, as soon as possible and at the latest within two months.
>
> 2. The information referred to in paragraph 1 of this Article is any available information in written, visual, aural or data base form on the state of the maritime area, on activities or measures adversely affecting or likely to affect it and on activities or measures introduced in accordance with the Convention.
>
> 3. The provision of this Article shall not affect the right of Contracting Parties, in accordance with their national legal systems and applicable international regulations, to provide for a request for such information to be refused where it affects:[ ]
>
> (d) commercial and industrial confidentiality;"

7. The United Kingdom refused to disclose the full reports, contending in its Counter-Memorial that:

- Article 9 of the OSPAR Convention does not establish a direct right to receive information but merely requires Contracting Parties to establish a domestic framework for the disclosure of information, and that such a framework has been established.[8]

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7. The OSPAR Tribunal's Final Award, written pleadings, transcripts of hearings and procedural decisions are available at the following URL: www.pca-cpa.org

8. Pursuant to the Environmental Information Regulations 1992, implementing Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment.

- Even if the United Kingdom was wrong regarding the above submission, Ireland would need to show that the information it was requesting was information within the scope of Article 9(2) of the OSPAR Convention. The United Kingdom contended that Ireland had failed to this – the information in question was not information within the scope of Article 9(2): it was insufficiently proximate to the state of the maritime area or to measures or activities affecting or likely to affect it.

- Even if the United Kingdom was wrong regarding the above submission, Article 9(3)(d) of the OSPAR Convention affirms the right of the Contracting Parties to provide for a request for information to be refused on grounds of commercial confidentiality. The United Kingdom has legislated to this effect and its refusal to disclose the particular information requested by Ireland was consistent with both national law and applicable international regulations.

8. The United Kingdom requested the Tribunal to adjudge and declare that it lacked jurisdiction over the claims brought by Ireland and/or that the claims were inadmissible.

The Three Sequential Questions for the Tribunal to Determine

9. On the basis of the claims as pleaded, the Tribunal considered that there were three sequential questions raised for determination by the Tribunal, namely:

- Does Article 9(1) of the OSPAR Convention put a 'direct' obligation on a Contracting Party to disclose "information" [within the meaning of Article 9(2)] on request, or is the obligation merely to set up a domestic framework for the disclosure of such information?

- If Article 9(1) creates a direct obligation, does the material the disclosure of which Ireland has requested, constitute "information" for the purposes of Article 9(2) of the OSPAR Convention?

- If so, has the United Kingdom redacted and withheld any information requested by Ireland contrary to Article 9(3)(d)?

Findings with respect to Article 9(1)

10. The unanimous view of the Tribunal was that the question posed by Ireland with respect to Article 9(1) was not one of jurisdiction or admissibility but one of substance. The issue for determination was whether the requirement in Article 9(1) "to ensure" the obligated result, required a result – the provision of information – (as Ireland contended) rather than merely a municipal law system directed to obtain the result (as the United Kingdom contended).

11. By a majority, the Tribunal found that the obligation in Article 9(1) is to be construed at the "mandatory end of the scale".[9] To accept the expression of the requirement "to ensure" a result as expressed at the lesser level of setting up a regime or system directed to obtain the stipulated result under domestic law, would be to apply an "impermissible gloss" that does not appear as

9. See Final Award, paragraph 134.

part of the unconditional primary obligation under Article 9(1).[10] The majority of the Tribunal found that Article 9(1) is "pitched at a level" that imposed an obligation of result, rather than merely to provide access to a domestic regime which is directed at obtaining the required result.[11] Accordingly, the Tribunal determined that Article 9(1) requires an outcome of result, namely that information falling within the meaning of Article 9(2) [and not excluded by Article 9(3)] is in fact disclosed in conformity with the Article 9 obligation imposed upon each Contracting Party.

Findings in respect of Article 9(2)

12. As with Article 9(1), the unanimous view of the Tribunal was that the question posed by Ireland with respect to Article 9(2) was not one of jurisdiction or admissibility but one of substance. The Tribunal was required to determine the proper construction of Article 9(2) in relation to the facts of this case. In this connection note that in its Memorial, Ireland put the redacted information in the PA and ADL reports into 14 categories. These 14 categories of information related to:

- estimated annual production capacity of the MOX facility;
- time taken to reach this capacity;
- sales volumes;
- probability of achieving higher sales volumes;
- probability of being able to win contracts for recycling fuel in 'significant quantities';
- estimated sales demand;
- percentage plutonium already on site;
- maximum throughput figures;
- life span of the MOX facility;
- number of employees;
- price of MOX fuel;
- whether, and to what extent, there are firm contracts to purchase MOX from Sellafield;

10. Ibid at paragraph 135. Note the Declaration in the Final Award of the Chairman, Prof. Reisman, in which he gives his reasons for not agreeing with the majority's interpretation of Article 9(1). He states, amongst other things, that Ireland's proposed meaning would require deletion of a critical phrase in Article 9(1) – namely "the seven critical words" underlined in the following extract from Article 9(1): "The Contracting Parties shall ensure that their competent authorities are required to make available the information….".

11. Ibid at paragraph 137.

- arrangements for transport of plutonium to, and MOX from, Sellafield;

- likely number of such shipments.

13. Accordingly, the determination under Article 9(2) required an examination of whether the categories of redacted information fell within the definition of "information" in Article 9(2). The Tribunal's holding on this issue was supported by a majority decision.[12] The Tribunal[13] noted that "information" was not a defined term, but they considered it to be clear that it "is a broad and inclusive reference to the state of the maritime area". Information falling within the scope of Article 9(2) should be regarded as "information" about the state of the maritime area.[14] On this basis, the view of the Tribunal was that it is "manifest…that none of the …14 categories [of information] in Ireland's list can plausibly be characterised as "information…on the state of the maritime area" [and] the Tribunal could, thus, rest its decision on the fact that none of the material in the 14 categories falls within the definition of "information" in Article 9(2)." [15]

14. However, the Tribunal analysed the position further and noted that Article 9(2) itself contains three categories of information, namely:

    - "any available information" on "the state of the maritime area,"

    - "any available information" on "activities or measures adversely affecting or likely to affect…the maritime area,"

    - "any available information" on "activities or measures introduced in accordance with the Convention."

15. Both Parties focused attention on the second category as being the relevant category to consider. Ireland argued what the Tribunal termed an "interpretative theory of inclusive causality".[16] On this argument anything, no matter how remote, which facilitated the performance of an activity could be deemed to be part of that activity. However, the Tribunal found that while the drafters of the OSPAR Convention sought inclusiveness with respect to some aspects of the information covered by Article 9(2), they had no intention of adopting a theory of inclusive causality. In particular, the Tribunal noted the second category of information in Article 9(2) contains an additional threshold of exclusion/inclusion that is constructed around the phrase "adversely affecting or likely to affect" the maritime area. The restrictive effect of the language (i.e. the requirement to show existing or prospective adverse affects on the maritime area) the Tribunal said, was clear and the standard which the Tribunal must apply.

16. The Tribunal found that:

> "…Ireland has failed to demonstrate that any of the 14 categories of redacted items in the PA and ADL Reports, insofar as they might be taken to be activities or

12. The substantive findings on the interpretation of Article 9(2) and applicable law were based on a majority decision by Prof. Reisman and Lord Mustill.

13. References in this part of the case note to "the Tribunal" are references to the majority.

14. Ibid at paragraph 168.

15. Ibid at paragraph 163.

16. Ibid at paragraph 164.

> measures with respect to the commissioning and operation of a MOX plant at Sellafield, are "information… on the state of the maritime area" or, even if they were, are likely adversely to affect the maritime area."[17]

17. The Tribunal observed that Ireland, "rather than engage the requirement of establishing an adverse effect" sought to rely on the provisions of treaties that are unratified and not in force between the Parties, or on regional initiatives that have not been finalised". The Tribunal said that it was not empowered to apply "legally unperfected instruments."[18]

No Need for a Determination under Article 9(3)(d)

18. If any of the 14 categories of information in question had been regarded as information falling within the ambit of Article 9(2) it would then have been necessary for the Tribunal to have considered in detail the actual *content* of the redacted information in each of the relevant categories in order for a determination to be made as whether the withholding of the information was lawful on grounds of commercial confidentiality as provided for by Article 9(3)(d).[19] However, given the Tribunal's finding as regards Article 9(2), the Tribunal found (again by a majority decision) that as a consequence, Ireland's claim – that the United Kingdom had breached its obligation under Article 9 of OPSPAR by refusing, on the basis of its understanding of the requirements of Article 9(3)(d), to make information available – did not arise.[20]

Conclusions

19. Ireland, therefore, failed in its attempt to use the OSPAR Convention as means of compelling the United Kingdom to disclose information that it (the United Kingdom) considered to be commercially confidential information. The fact that the information requested was essentially of an economic and commercial nature, rather than what one might describe as information relating to the marine environment, clearly influenced the majority of the Tribunal in terms of deciding that the information fell outside of the ambit of the OSPAR Convention.

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17. Ibid at paragraph 179.

18. Ibid at paragraph 180. A starkly different view was expressed in the dissenting opinion of Dr. Gavan Griffith QC. Dr. Griffith disagreed with what he regarded as a restrictive interpretation of the applicable law by the majority. He considered that emerging legal instruments concerning the environment ought to be taken into account. For example, he was of the view that although the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters had not been ratified by the Parties, it did not follow that this Convention could not inform issues of construction of Article 9 of the kind that arose in the dispute.

19. Much of the hearing was taken up with expert and factual evidence being presented to the Tribunal on the question of or not the redacted material could be properly regarded as commercially confidential.

20. See Final Award, paragraph 185(v).

ADMINSTRATIVE DECISIONS

Romania

Government Decision for the return of nuclear fuel to the Russian Federation (2003)

Government Decision No. 1077 was adopted 11 September 2003, and published in the Official Gazette (*Monitural Oficial*, Part I, No. 666) on 19 September 2003. The Decision provides that Romania is to return to the Russian Federation the non-irradiated and unspent nuclear fuel containing substantially enriched uranium – which originates from the Russian Federation and which is currently in storage at the "*Regie Autonome*" for Nuclear Activities. The material is to be considered as waste with no commercial value attached. It is to be delivered by the "*Regie Autonome*" for Nuclear Activities to the National Commission for the Control of Nuclear Activities *(Comisia Nationala pentra Controlul Activitatilos Nucleare – CNCAN*), the public institution authorised under law to carry out such exports in the name of the Romanian State. The Decision specifies that the official authorised to negotiate and to conclude agreements for the export of nuclear fuel of Russian origin is the Chairman of the CNCAN.