

## Judgment

Case number: 200606331/1  
Publication date: Wednesday 21 February 2007  
Versus: *the State Secretary for Housing, Spatial Planning and the Environment*  
Type of proceedings: *First instance – full-bench division*  
Field of law: *Chamber 2 – Environment - Waste*

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### ADMINISTRATIVE JURISDICTION DIVISION

Judgment in the action between:

Stichting Greenpeace Nederland, a foundation that has its seat in Amsterdam, and others,  
claimants,

and

the State Secretary for Housing, Spatial Planning and the Environment,  
defendant.

#### 1. Course of the proceedings

Under Council Regulation (EEC) No. 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community ('the Regulation'), the defendant raised objections in an order of 7 July 2006 to the proposed shipment of waste, namely the transfer of a decommissioned tanker, the MV Otapan, to Turkey for scrapping.

By order of 14 July 2006, which was sent on the same day, the defendant upheld the

objection lodged by Basilisk, a corporate body under Mexican law, to the previous order (i.e. the order of 7 July 2006) and authorised the proposed shipment after all.

The claimants contested this decision by applying to the Council of State by letter of 25 August 2006, which was received by fax on the same day. The grounds were amplified in a letter of 25 September 2006.

The defendant lodged a statement of defence by letter of 1 December 2006.

Further documents were received from the claimants and the defendant after the conclusion of the preliminary judicial examination. These were sent to the other parties.

The Division dealt with the case at a hearing on 15 January 2007 where the claimants were represented by B.N. Kloostra, advocate in Amsterdam and [director] of the claimant, the Stichting Greenpeace foundation, and the defendant by W. Huiberts, a ministry official, and J.E. den Hartog-van 't Zelfde, an employee of SenterNovem.

Further documents were lodged in the action unopposed by the parties.

## 2. Grounds

2.1. Under the Regulation the defendant raised objections in his order of 7 July 2006 to Basilisk's intention of shipping waste – in the form of a decommissioned tanker with 1,000 kilograms of asbestos-containing materials on board – to Turkey in the period from 1 June 2006 to 31 May 2007 for scrapping at the Simsekler shipyard in Izmir. The waste processing operation is classified in the notification form bearing reference NL 118699 as 'recovery' as defined in Category R4, recycling/reclamation of metals and metal compounds, of Annex IIB to Directive 2006/12/EC ('the Directive').

The defendant objected to the proposed shipment on the ground that no financial guarantee in the form of a deposit or a bond had been provided. In response to the notice of objection lodged by Basilisk and after the requisite bank guarantee required for the proposed shipment had been provided, the defendant ruled in an order of 14 July 2006 that Basilisk's objection to the order of 7 July 2006 was well founded and

that the proposed shipment should therefore be authorised.

2.2. The defendant has argued that the claimants cannot be treated as interested parties within the meaning of section 1:2, subsection 1 of the General Administrative Law Act.

2.2.1. 'Interested party' is defined in section 1:2, subsection 1 of the General Administrative Law Act as a person whose interest is directly affected by an order.

Section 1:2, subsection 3 of the General Administrative Law Act, provides that the interests of corporate bodies are deemed to include the general and collective interests which they specially represent in accordance with their objects and as evidenced by their actual activities.

2.2.2. The proceedings have been instituted by Stichting Greenpeace ('the Foundation'), by Limter-Ýþ (a corporate body under Turkish law) and by [person at 1] and [person at 2] (natural persons).

2.2.3. Under article 2, paragraph 1 of the Foundation's bylaws, as these read when the proceedings were brought, the object of the Foundation is to promote nature conservation. According to article 2 (2) of these bylaws it endeavours to do this throughout the world by, among other things, ending certain abuses. It also does everything that may be directly or indirectly connected with or conducive to this, this being interpreted in the widest sense. This object describes sufficiently precisely the general and collective interests that are specially represented by the Foundation. These interests are also reflected in the activities actually performed by the Foundation. These interests are directly affected by the disputed order. The Foundation should therefore be treated as an interested party within the meaning of section 1:2 of the General Administrative Law Act.

2.2.4. However, the Division considers that 'Limter-Ýþ', a corporate body under Turkish law, and [person at 1] and [person at 2], natural persons, cannot be treated as interested parties within the meaning of section 1:2, subsection 1 of the General Administrative Law Act. One of the objects of Limter-Ýþ, a trade union organisation and corporate body under Turkish law, is to promote good working conditions for shipyard workers and protect their rights and freedoms (see article 4 of its bylaws, as these read when the application was lodged). In view of this object, the interests of

this organisation cannot be held to be directly affected by the defendant's order authorising the shipment to Turkey.

It became apparent from the documents and the proceedings at the hearing that [person at 1] and [person at 2] live at a distance of 6-7 kilometres from the shipyard to which the Otapan would be brought for scrapping. This distance is such that in the opinion of the Division their interests cannot be said to be directly affected. Nor is there any evidence of facts and circumstances on the basis of which these claimants could be classified as interested parties within the meaning of section 1:2, subsection 1 of the General Administrative Law Act in relation to the order of 14 July 2006.

In so far as the application has been lodged by Limter-Ýþ, a corporate body under Turkish law, and by [person at 1] and [person at 2], it is therefore inadmissible.

2.3. The defendant has argued that since the Otapan has returned to the Netherlands no interest would now be served by assessing the merits of the application. The defendant pointed out in this connection at the hearing that a fresh notification is required for the shipment.

2.3.1. It is evident from the documents that the Otapan left the Netherlands for Turkey at the end of July 2006. As the vessel had more asbestos on board than specified in the notification, Turkey refused to allow it to enter its territorial waters. The defendant then decided that the ship should return to the Netherlands. The proposed shipment was therefore not completed. It is also apparent from the documents that it is proposed to send the vessel back to Turkey once the quantity of asbestos aboard has been brought into line with the notification that forms the subject of these proceedings. The Division does not therefore agree with the defendant that if the shipment takes place before 1 June 2007 it would not be possible to make do with the notification of 29 May 2006 and that the Regulation requires a fresh notification. This is why there is still an interest in assessing the merits of the application.

2.4. The claimants also submit that Basilisk cannot be treated as notifier within the meaning of article 2, opening words and (g) of the Regulation. According to the claimants, it has been established that Basilisk cannot be treated as the original producer of the waste and is also not a registered or licensed collector or dealer. Nor, according to the claimant, can Basilisk be classified as the holder of the waste.

2.4.1. The term notifier is defined in article 2, opening words and (g), of the Regulation as ‘any natural person or corporate body to whom or to which the duty to notify is assigned, that is to say the person referred to hereinafter who proposes to ship waste or have waste shipped:

- i) the person whose activities produced the waste (original producer); or
- ii) where this is not possible, a collector licensed to this effect by a Member State or a registered or licensed dealer or broker who arranges for the disposal or the recovery of waste; or
- iii) where these persons are unknown or are not licensed, the person having possession or legal control of the waste (holder); or
- iv) in the case of import into or transit through the Community of waste, the person classified by the laws of the State of dispatch or, when this designation has not taken place, the person having possession or legal control of the waste (holder).’

2.4.2. It is clear from the documents that Basilisk cannot be treated as the original producer of the waste. Nor does Basilisk fulfil the conditions of article 2, opening words and (g) (ii) of the Regulation. It is therefore necessary to decide whether Basilisk can be classified as the holder of the waste that forms the subject of the action.

2.4.3. On the basis of the documents and the proceedings at the hearing, the Division considers that the facts of the case are as follows. The Otapan arrived in the port of Amsterdam in September 1999. At that time it was owned by Navimin, a corporate body under Mexican law. This company was declared bankrupt in mid-2005. Basilisk acquired the ownership of the Otapan in September 2005 following a ruling by the Mexican courts. It gave notice of the proposed removal of the ship to Turkey on 29 May 2006. At that moment the ship was under its legal control as owner. This was not altered by the fact that the Otapan was in a Dutch port at the time of notification.

In view of the above the defendant has correctly taken the position that Basilisk may be classified as notifier within the meaning of article 2, opening words and (g) of the Regulation. The Division does not consider that anything submitted by the claimants in this regard warrants a different opinion. This ground of application does not succeed.

2.5. The claimants argue that the defendant wrongly failed to classify the scrapping of the ship as a disposal operation. They point out here that the ship contains asbestos and possibly flammable liquids and PCB-containing substances too, which should be removed before the ship is broken up for scrap.

2.5.1. The Court of Justice of the European Communities ('the Court of Justice') held in its declaratory judgment of 3 April 2003 in case C-116/01 that where a waste treatment process comprises several distinct stages, it must be classified as either a disposal operation or a recovery operation within the meaning of the Directive, for the purpose of implementing the Regulation, taking into account only the first operation that the waste is to undergo subsequent to shipment.

In its declaratory judgment of 27 February 2002 in case C-6/00 and in its decision of 27 February 2003 in the joined cases C-307/00 to C-311/00, the Court of Justice held that in order to determine whether an operation is a disposal or recovery operation within the meaning of the Directive it must be ascertained on a case-by-case basis whether the main objective of the operation in question is that the waste serves a useful purpose, by replacing the use of other materials which would have had to be used to fulfil that function, and that in such a case it must be classified as recovery.

2.5.2. The notification form bearing reference NL 118699 states that the proposed shipment relates to a decommissioned tanker with asbestos-containing material on board. This operation is described on the form as recovery as referred to in Category R4 of Annex IIB to the Directive. A plan for the scrapping of the ship was attached as an annex to the form. In the Division's opinion, it can be inferred from this that, contrary to what the defendant submitted at the hearing, the treatment of the waste specified in the notification is a process consisting of several stages. The scrapping plan states that the first part of the operation is to remove the asbestos in the ship. It follows from the plan that the removal of the asbestos is necessary in order to enable the ship to be scrapped. The plan also emphasises that no other work on the ship, for example the removal of liquids and gases, should start until the asbestos has been removed. In view of the above the Division considers that the waste treatment process is wrongly classified on the notification form as a recovery operation as referred to in category R4 of Annex IIB to the Directive. Nor is this altered by the fact that substances obtained from the dismantling of the ship will subsequently be transferred from the Simsekler yard to the metalworking industry for recycling, which could possibly be classified as a recovery operation.

In these circumstances it must be concluded that the defendant wrongly failed to object to the proposed shipment on the ground of an incorrect classification on the notification form.

This ground of application succeeds.

2.6. The application lodged by Limter-Ýþ, a legal person under Turkish law, and by [person at 1] and [person at 2] is therefore inadmissible. The application lodged by the Foundation is well founded. The disputed order should be quashed. As the object of the present shipment of waste to Turkey is disposal, which is prohibited under article 14 (1) of the Regulation, the only possible decision which the defendant can take on Basilisk's notice of objection to the order of 7 July 2006 is to revoke the order. The Division will therefore decide the case in the manner described below and provide that this judgment takes the place of the quashed order. The other grounds of the application need not be considered.

2.7. The defendant should be ordered to bear the costs of the proceedings in the manner referred to below.

### 3. Decision

The Administrative Jurisdiction Division of the Council of State

Giving judgment in the name of the Queen:

I. declares that the application submitted by Limter-Ýþ, a corporate body under Turkish law, [person at 1] and [person at 2] is not admissible;

II. declares that the application lodged by the Stichting Greenpeace foundation is well founded;

III. quashes the order of the State Secretary for Housing, Spatial Planning and the Environment of 14 July 2006, reference JZ/EVOA\_JZ/060945/BPA;

IV. revokes the order of the State Secretary for Housing, Spatial Planning and the Environment of 7 July 2006, reference NL 118699;

V. directs that this judgment takes the place of the quashed order;

VI. orders the State Secretary for Housing, Spatial Planning and the Environment to pay the legal costs incurred by the Stichting Greenpeace foundation in connection with the hearing of the application, namely €665.33 (six hundred and sixty-five euros and thirty-three cents), of which €644 (six hundred and forty-four euros) is attributable to legal representation provided professionally by a third party; it should be paid by the State of the Netherlands (Ministry of Housing, Spatial Planning and the Environment) to the Stichting Greenpeace foundation, quoting the case number;

VII. orders that the State of the Netherlands (Ministry of Housing, Spatial Planning and the Environment) pay to the Stichting Greenpeace foundation the registry fee of €281 (two hundred and eighty-one euros) for the hearing of the application.

As delivered by T.G. Drupsteen, president, and W.D.M. van Diepenbeek and M.W. L. Simons-Vinckx, members of the court, in the presence of D. van Leeuwen, official of the Council of State.

(signed) Drupsteen  
President

(signed) Van Leeuwen  
Official of the Council of State

Judgment given in a public session on 21 February 2007