SPC Guiding Case No. 174: China Biodiversity Conservation and Green Development Foundation v. Yalong River Basin Hydropower Development Co., Ltd. (Ecological Environmental Protection Civil Public Interest Litigation)

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Unofficial English translation prepared for reference only. The official Chinese text prevails.

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Keywords

Civil / ecological environmental protection civil public interest litigation / potential risk / preventive measures / endangered wild plants

Holding

When trying a case of environmental civil public interest litigation, a people's court shall implement the concept of green development and the principle of risk prevention. Where, based on existing evidence and science and technology, the court finds that the completion of a project may damage the living environment of endangered wild plants at the site in issue and that there is a potential risk affecting their survival, thereby harming the ecological environment and the public interest, it may order the defendant to take preventive measures and to incorporate the impact on the survival of the endangered wild plants into the environmental impact assessment of the construction project, so as to promote the coordination of environmental protection and economic development.

Basic Facts

The Yagen cascade hydropower station on the Yalong River is constructed and managed by Yalong River Basin Hydropower Development Co., Ltd. ("Yalong Company"), and is currently at the pre-feasibility study stage; the hydropower station and its auxiliary works (such as roads) have not yet commenced construction.

In the China Biodiversity Red List published on September 2, 2013, Acer pentaphyllum was assessed as "Critically Endangered." On February 9, 2016, Acer pentaphyllum was included in the Sichuan Province Catalogue of Key Protected Plants. On August 10, 2018, the International Union for Conservation of Nature assessed Acer pentaphyllum as "Critically Endangered" in its Red List. At that time, Acer pentaphyllum was not included in China's National Catalogue of Key Protected Wild Plants. On September 26, 2016, the Sichuan Provincial Bureau of Quality and Technical Supervision issued the Technical Regulations for Sowing and Raising Seedlings of Acer pentaphyllum. The population of Acer pentaphyllum at issue is located in Woluoxi Village, Malangcuo Township, Yajiang County, Sichuan Province, and the local forestry authorities have erected a protection sign on the retaining wall of the nearby township road.

In June 2006, the Chengdu Survey, Design and Research Institute of China Hydropower Engineering Consulting Group ("Chengdu Institute") completed the Report on the Hydropower Planning of the Middle Reaches of the Yalong River in Sichuan Province (the Lianghekou to Kala Section), which included the Yagen cascade hydropower station in the planning; the planning report passed the review organized by the General Institute of Hydropower and Water Resources Planning and Design together with the Sichuan Provincial Development and Reform Commission in August 2006. In December 2008, the Sichuan Provincial People's Government approved the plan by Document Chuan Fu Han [2008] No. 368. In March 2010, based on the latest situation of the inundation area of the Yagen cascade reservoir, the Chengdu Institute adjusted the originally planned Yagen cascade into two levels of development — Yagen Level I (normal pool level

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2,602 m) and Yagen Level II (normal pool level 2,560 m) — forming the Research Report on the Hydropower Development Scheme for the Lianghekou to Yagen Section of the Yalong River in Sichuan Province, which passed review by the General Institute of Hydropower and Water Resources Planning and Design together with the Sichuan Provincial Development and Reform Commission in August 2010.

On January 6 and April 13, 2013, the General Office of the National Development and Reform Commission approved the commencement of preliminary work for the Yagen Level II and Yagen Level I hydropower stations. The stations were to be constructed and managed by Yalong Company, which was to organize the various preliminary work for the hydropower stations in accordance with the relevant provisions on project approval. After the relevant preliminary work was completed and the conditions for approval were met, the project application reports for the Yagen cascade hydropower stations were to be submitted separately to the Commission. Opinions on project construction were to be based on the Commission's approval of the project application reports. Construction could not commence without approval.

The China Biodiversity Conservation and Green Development Foundation ("CBCGDF") considered that the population of Acer pentaphyllum near Woluoxi Village, Malangcuo Township, Yajiang County is the largest surviving population of Acer pentaphyllum in the world today and the only population still capable of natural reproduction. The Yagen cascade hydropower station was about to be constructed, and, according to a comparison of the altitude of the distribution area of the Yajiang population of Acer pentaphyllum with the water level of the hydropower station, the Yagen cascade hydropower station and its supporting road construction would directly threaten the survival of Acer pentaphyllum and pose a direct threat to the public interest. CBCGDF therefore brought this preventive public interest litigation.

Judgment

The Intermediate People's Court of Ganzi Tibetan Autonomous Prefecture, Sichuan Province rendered Civil Judgment (2015) Gan Min Chu Zi No. 45 on December 17, 2020: 1. The defendant Yalong Company shall treat the survival of Acer pentaphyllum as an important part of the environmental assessment work at the feasibility study stage of the Yagen cascade hydropower station project, and may only continue the next stage of work after the environmental impact report has been approved by the competent environmental protection administrative authority; 2. The necessary expenses of RMB 40,000 incurred by the plaintiff CBCGDF for this litigation and the reasonable lawyer's fees of RMB 10,000, totaling RMB 50,000, shall be paid from the ecological environment restoration expenses and the expenses for the loss of service functions during the period from the damage to the ecological environment to its restoration (environmental public interest litigation funds) that the defendants were ordered to bear in other environmental civil public interest litigation cases heard by this court (to be enforced after this court has other environmental public interest litigation funds); 3. The remaining claims of the plaintiff CBCGDF were dismissed. After the first-instance judgment was pronounced, the parties did not appeal, and the judgment became legally effective.

Reasoning

The effective judgment held: China is a contracting party to the United Nations Convention on Biological Diversity and shall abide by its provisions. The Convention on Biological Diversity provides that, where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat; that States have the responsibility to conserve their own biological diversity and to use their own biological resources in a sustainable manner; and that each contracting party shall, as far as possible and as appropriate, adopt appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity, with a view to avoiding or minimizing such effects. Therefore, China has an obligation to protect biological diversity. At the same time, the Convention on Biological Diversity provides for the recognition that economic and social development and poverty eradication are the first and overriding priorities of developing countries. In accordance with Article 4 of the Energy Conservation Law of the People's Republic of China, which provides that "conserving resources is a

basic national policy of our country; the State implements an energy development strategy of pursuing conservation and development simultaneously and putting conservation first," and Article 2, paragraph 1 of the Renewable Energy Law of the People's Republic of China, which provides that "renewable energy as used in this Law means non-fossil energy such as wind energy, solar energy, hydro energy, biomass energy, geothermal energy, and ocean energy," renewable energy is an important energy resource of our country and plays an important role in meeting energy demands, improving the energy structure, reducing environmental pollution, and promoting economic development. Hydropower resources are the renewable energy with the greatest scale-development benefits and the most mature technology. Therefore, developing and constructing hydropower stations, converting the advantages of hydropower resources into economic advantages, and rationally developing hydropower by utilizing abundant hydropower resources under the supervision of the relevant State authorities conform to China's national conditions. However, regions in China with abundant hydropower resources are often also regions with a good natural environment, important ecological functions, rich biological species, and fragile geological conditions. According to the relevant provisions of the Environmental Protection Law of the People's Republic of China and the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Environmental Civil Public Interest Litigation Cases, environmental protection is a basic national policy of our country, and environmental protection shall adhere to the principle of giving priority to protection and putting prevention first. The precautionary principle requires that, before and during the implementation of acts of utilizing environmental resources, political, legal, economic, and administrative means be adopted to prevent environmental pollution or ecological damage from occurring as a result of acts of environmental utilization. It has two meanings: first, using existing knowledge and experience to adopt measures to avoid the occurrence of harm in respect of the possible environmental hazards brought about by acts of developing and utilizing the environment; and second, under conditions of scientific and technological uncertainty, evaluating risks based on realistic scientific knowledge, that is, predicting, analyzing, and evaluating in advance the environmental hazards that may be brought about by acts of developing and utilizing the environment that are not yet clear or cannot be specifically determined, so as to promote development decisions that avoid the possible occurrence of environmental hazards and their risks. Therefore, the relationship between environmental protection and economic development is not entirely antagonistic but complementary; by correctly handling the relationship between protection and development and running the principle of ecological priority through the whole process of hydropower planning and development, the two can promote each other and achieve coordinated economic and environmental development. Acts of utilizing environmental resources, if they cause environmental pollution or damage to ecological resources, are often irreversible; polluted environments and damaged ecological resources are in many cases difficult to restore, and purely ex post economic compensation is insufficient to make up for the losses caused to the ecological environment. Therefore, attention should be paid to preventing environmental pollution and ecological damage before they occur, so as to truly realize the purpose of environmental protection.

Specifically in this case, in view of the grade of Acer pentaphyllum in the Biodiversity Red List and the potential risk that the completion of the Yagen cascade hydropower station at issue may damage the original living environment of Acer pentaphyllum at the site and affect its survival, thereby potentially harming the public interest, and according to the provisions on the approval process for hydropower projects in China, which divides hydropower projects into four stages — project planning, project pre-feasibility study, project feasibility study, and project approval — considering that the Yagen cascade hydropower station at issue is currently at the project pre-feasibility study stage, it is necessary and reasonable to order the defendant, at the project feasibility study stage, to strengthen the environmental impact assessment of Acer pentaphyllum at issue and to fulfill the statutory approval procedures before proceeding to the next step of work, so as to avoid as far as possible the risk of endangering the survival of wild Acer pentaphyllum. Therefore, where CBCGDF, as a qualified social organization, proposed the claim of "ordering the defendant in accordance with the law to immediately adopt appropriate measures to ensure that the survival of the precious and endangered wild plant Acer pentaphyllum will not be damaged by the implementation of the Yalong River

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cascade hydropower development plan," in circumstances where the construction of the Yagen cascade hydropower station may present a major risk of harming the environmental public interest, the claim had a legal basis and the people's court supported it.

In view of the fact that the hydropower station at issue had not yet commenced construction, CBCGDF's claim of "ordering the defendant in accordance with the law to suspend all construction of the Yagen cascade hydropower station and its auxiliary facilities (including supporting roads) before the measures adopted are sufficient to eliminate the threat to the survival of Acer pentaphyllum" had no factual basis, and the people's court did not support it.

Relevant Legal Provisions

Article 5 of the Environmental Protection Law of the People's Republic of China (as amended on April 24, 2014).

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