

TAKING NUCLEAR THIRD PARTY LIABILITY INTO THE FUTURE

- Fair compensation for citizens and a level playing field for operators

A US Perspective

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United States Nuclear Liability Regime

1957 Price-Anderson Act

- ◆ Created world's first nuclear liability regime. Amount now about US\$13.6 billion for 104 NPPs, by far highest monetary coverage of any nuclear liability regime in world.
- ◆ Based system of "omnibus" coverage for "anyone liable" for nuclear incident to avoid interfering with State tort law by channeling liability exclusively to plant operator.
- ◆ This is called "economic" channeling, as opposed to system of legal channeling of liability to plant operator (as in Paris and Vienna Conventions); it is not sharing of liability between operators and suppliers (as EU Questionnaire stated).
- ◆ Each NPP operator provides coverage for anyone liable through combination of primary financial protection of maximum amount of insurance available: now US\$375M; and, secondary financial protection of retrospective assessments: now US\$121,255,000 per plant per incident plus 5% for claims and costs (payable in annual installments up to maximum of US\$18,963,000 per plant per incident).
- ◆ Payments guaranteed by U.S. Government; and, inflation adjustment every five years, most recent quinquennial inflation adjustment effective on September 10, 2013.
- ◆ When U.S. ratified Convention on Supplementary Compensation for Nuclear Damage (CSC) in 2008, treaty became part of U.S. regime. CSC "grandfathers" U.S. economic channeling.

CSC “Grandfather Clause”

- ◆ CSC provision enables United States (with 104 of world’s power reactors and world’s highest compensation amount) to be party without changing 1957 Price-Anderson Act’s economic channeling to legal channeling; clause requires indemnification of operator and all other persons liable for nuclear damage.
- ◆ Practical effect is negligible; all other core principles of conventions preserved (e.g., single competent court, exclusive operator financial liability, etc.); and, U.S. would pay highest share of CSC fund.
- ◆ Clause even requires U.S. to ensure availability of at least 1000 million SDRs for power reactors, while other CSC Members required to maintain only 300 million SDRs.
- ◆ Three Mile Island accident demonstrated economic channeling little different from legal channeling; involved claims against operator, reactor vendor & architect-engineer with all fully covered by U.S. nuclear insurance pool using one law firm for claims defense and settlement.
- ◆ 1975 German ratification of Paris Convention made with reservation of right for Germany to adopt economic channeling, so Germany previously has recognized such does not defeat any core purpose of conventions.

US Operator Pooling

- ◆ Mandated in 1975 Amendments; second tier of Federal Government indemnification phased out in November 1982 when there were 80 reactors and US\$160 million of insurance. 1988 Amendments increased assessment amount from US\$5M to US\$63M, and made it subject to quinquennial inflation adjustments.
- ◆ Important consideration for actual payment of retrospective assessments could be number and financial wherewithal of operators liable: When retrospective assessment system first was added to Price-Anderson Act, maximum amount per reactor was only US\$5M; and, more separate utilities (all subject to same regulator) owned and operated reactors.
- ◆ Today, with inflation adjustments and likelihood more plants will be decommissioned, potential assessments are much higher; at same time, there have been significant corporate consolidations of plant ownership; these factors could have significant effects on cash flow needed to pay assessments or even solvency of particular utility (e.g., 110 reactors were licensed to 47 operating utilities in 1997); consolidations greatly reduced number of operators.
- ◆ Any consideration of adopting some pooling arrangement within EU should take into account whether utilities with large numbers of reactors (each regulated by their own Installation State) would be able to pay (e.g., France has 1 operator with 56 reactors.) Also, if number of operating reactors is reduced, assessment amounts would have to be increased to maintain aggregate levels of coverage.

Need for a Global Nuclear Liability Regime

Global Approach

- ◆ EC should take into account **IAEA's September 2011 Action Plan on Nuclear Safety** called on its Member States to work towards establishing *global* nuclear liability regime that addresses concerns of all States that may be affected by nuclear accident, which are likely to have transboundary consequences.
- ◆ CSC is only existing convention that could effectively make EU part of more global nuclear liability regime and harmonize both EU-wide liability amounts and provisions (e.g., making it unnecessary to remove nuclear exception in 2004 Environmental Liability Directive).
- ◆ Global nuclear liability regime cannot be achieved by EU acting alone or even through Joint Protocol, while allowing discrimination between EU victims under Paris Convention Members' Joint Declaration on reciprocity.
- ◆ Of 435 operable NPPs worldwide, fewer than half are now covered by one of Conventions: 116 covered by Paris Convention; 73 covered by Vienna Convention; only 58 (43 of which are in EU) covered by Joint Protocol.
- ◆ CSC would cover many more of world's 435 operable NPPs, and would ensure higher amounts of financial protection for victims, international contributions, consistent definition of "nuclear damage" and greater legal certainty.

Need for Level Playing Field

Level Playing Field For Suppliers As Well As Operators

- ◆ Nuclear trade becoming more and more globalized. EU suppliers will be disadvantaged, if solution is to simply adopt nuclear liability regime applicable only within EU.
- ◆ Without treaty relations, EU States' suppliers will remain exposed to extra-territorial liability risks in their consortia and joint ventures, and also during transport.
- ◆ Paris and Vienna Conventions or any EU rules would not protect them from foreign claimants or forum shopping in foreign or domestic courts.
- ◆ This could result in distortion of competition, preventing access in EU market of best available technology needed to better ensure nuclear safety and security.
- ◆ EU should take into account impacts any changes in regimes would have on transatlantic treaty relations and trade (e.g., in line with EU and United States in process of negotiating Transatlantic Trade and Investment Partnership (TTIP)).

JOINT PROTOCOL

- ◆ Joint Declaration on reciprocity being unilaterally adopted for Paris Convention (and already introduced in many new 2004 Paris Convention implementing laws) would make Joint Protocol one-sided.
- ◆ It aims to extend full benefits of Paris Convention only conditionally to victims of all Vienna Convention States, while Vienna Joint Protocol States are required to recognize this unconditionally; this would defeat very object of Joint Protocol, since it was ratified by Vienna Joint Protocol States with aim to obtain full compensation from liable Paris Convention operator.
- ◆ IAEA's 2013 Explanatory Text on Joint Protocol emphasizes that reciprocity requirements on amounts below €700M limit of 2004 Paris Convention in respect of JP/Vienna States may not be enforceable.
- ◆ CSC, on other hand, would fix a uniform minimum limit of 300M SDRs, making liability amounts more uniform with EU.
- ◆ Having all EU Member States in Paris Convention, while keeping treaty relations through Joint Protocol with non-EU Vienna States, is not viable option, as EU Vienna States would lose their treaty relations with non-Joint Protocol Vienna States, notably Russia.

Existing Treaty Relations

Responsible and Effective Solution

- ◆ Any harmonization within EU should take into account there currently are existing nuclear liability treaty relations between some EU Member States and number of other nearby non-EU Member States; any change in core nuclear liability principles would involve departure from already-existing obligations under international treaty law, complicate matters further, and reduce legal certainty and assurance of prompt and meaningful compensation to victims, creating such intricacies that a court may simply resort to other means/law.
- ◆ Note: Norway and Turkey are Parties to Paris Convention; Russia and Ukraine are Parties to Vienna Convention; Switzerland plans to join 2004 Paris Convention; Romania is Party to CSC. Number of Vienna States (*e.g.*, Ukraine) also are linked to EU Member States through Joint Protocol. Additionally, Czech Republic, Lithuania and Italy are CSC signatory countries (*i.e.*, they are already under international obligation not to defeat object and purpose of CSC).
- ◆ These treaty relations could have effects on amounts of coverage available to EU and non-EU victims, particularly if reciprocity requirements were applied, and may even result in conflict of laws or competing application of treaties, laws, jurisdiction, and/or liability provisions.

Global CSC Approach

Responsible and Effective Solution

- ◆ EU should join CSC, since it is only vehicle for creating truly global nuclear liability regime.
- ◆ CSC is only nuclear liability convention that United States (with 104 plants) eligible to join; Canada with 19 plants and Ukraine with 15 plants already signed; and, Japan with 50 plants and UAE intend to join.
- ◆ EU Member States can join CSC, while leaving Paris and Vienna Conventions and Joint Protocol intact.
- ◆ Entry into force of CSC (which could happen this year) will change international nuclear liability landscape. Effects for EU Member States and their nuclear industries that are globally active should be taken into account and analyzed.
- ◆ EU rules would only complicate matters more, increase legal uncertainty, and cannot result in harmonization: They cannot effect rights and obligations with other non-EU Convention States, such as Norway, Turkey, Switzerland, and 30+ non-EU Vienna States nor EU non-Convention States (Austria, Cyprus, Ireland, Luxembourg, and Malta).

EU Member States Should Join CSC

Responsible and Effective Solution

- ◆ Should EU Member States join CSC, it would enter into force immediately, have harmonizing effect on core nuclear liability principles, result in liability limit of at least 300M SDRs, and give effect to principle of nondiscrimination.
- ◆ EU Member States would be in treaty relations under CSC, and enjoy benefits from CSC's global international fund, which provides solidarity for increasing compensation for victims. BSC funds are now only available for BSC victims, leaving out 15 EU States, resulting in categories of victims being discriminated against.
- ◆ EU could jointly contribute to CSC fund (nothing in CSC would prohibit this); contribution could be shared among EU nuclear States or operators. Operators could take out insurance for such amounts with premiums that are negligible.
- ◆ Simple analysis demonstrates that, in any scenario of CSC ratification (and only in unlikely case of accident), contingent contribution per EU nuclear Member State would average no more than €5M to 6M, which is less than 0.5% of 2004 Paris limit of €1.2B; total EU contribution not more than 7 to 9% of total 2004 Paris/BSC fund of €1.5B.
- ◆ All victims would have access to additional funds above 300M SDRs (just like Paris/BSC victims), while reducing discrimination, increasing legal certainty, and avoiding unpredictable liability exposure for global activities and forum shopping by victims left without adequate compensation.

Conclusions

- ◆ While improvements in current nuclear liability regimes applicable in EU could theoretically be made (particularly with respect to achieving more uniformity in liability coverage amounts and compensable heads of damage both within EU and globally), EC should proceed cautiously.
- ◆ Thorough and independent analysis will demonstrate that it would be more beneficial and cost-effective for EU nuclear industry and potential victims, as well as EU Member States, for EU to expand harmonization through CSC.
- ◆ So far, insufficient analysis of law and facts surrounding costs and benefits of CSC for EU; may later prove to be detrimental to victims, stakeholders, EU Member States, and sustainability of disjointed nuclear liability system within EU.
- ◆ Any decision based upon narrow approach may prove to be neither wise nor responsible in long run, especially if future global developments expose shortcomings that could have been avoided by comprehensive global approach.
- ◆ Best and quickest course of action to achieve more uniformity would be for EU Member States to join CSC.