# Implications of the CSC for suppliers

James A Glasgow talks *NEI* through the detail and implications of a new convention on compensation for nuclear damage.

The Convention on Supplementary Compensation for Nuclear Damage (CSC) will provide additional funds to compensate those who substantiate claims for nuclear damage following a nuclear incident at a nuclear power station or other covered facility in a country that is a party to the CSC.

The CSC will enter into force on 15 April 2015, 90 days after Japan ratified it. On 7 July 2014, the United Arab Emirates became the fifth country to ratify the CSC, thus meeting the CSC's requirement, for entry into force, of at least five ratifying countries. But the CSC also required the ratifying countries to total at least 400GWt of nuclear generating capacity – a condition met by Japan's ratification.

Countries that may join the CSC are those that are a party to the Paris Convention on Third Party Liability in the Field of Nuclear Energy, or the Vienna Convention on Civil Liability for Nuclear Damage, and other countries whose nuclear liability laws comply with the requirements of the Annex to the CSC. The Annex's key requirements are that the laws of the country require facility operators to maintain financial protection against nuclear third party liability, in an amount that satisfies the CSC's requirement; and that they channel strict or absolute (no fault) liability exclusively to the operator of the nuclear installation at which a nuclear incident occurs.

Vendors will benefit from the CSC's supplementary compensation, because persons who suffer nuclear damage will be more likely to be compensated in the CSC country where the incident occurred, so they may be less likely to pursue claims against vendors in other countries.

If a vendor supplies reactor components, nuclear fuel or otherwise assists a nuclear power station located in a country that is a CSC party, the CSC will provide the following protection:

- The CSC's pool of supplementary compensation will be available if claims for nuclear damage exceed that country's own mandatory ("first tier") financial protection.
- Lawsuits claiming nuclear damage that are filed against such a vendor in its own country that is a CSC party or in any other CSC party should be dismissed, since jurisdiction over such lawsuits is channelled exclusively to the CSC country where the nuclear incident took place.

When it enters into force in April, the CSC's channelling of jurisdiction will immediately protect, with respect to future nuclear incidents, vendors in CSC countries who have supplied (or may supply) to the six initial parties (Argentina, Japan, Morocco, Romania, United Arab Emirates and the USA).

Vendors' nuclear liability risk was discussed in a letter from the US Secretary of State Colin Powell to the president in 2001, asking him to submit the CSC to the Senate for its advice and consent to ratification. Powell said that US nuclear suppliers "are exposed to potentially unlimited liability in their foreign businesses and to suit in US courts. Even if the suits are baseless, expenses to defend such cases can be substantial."

If a nuclear incident occurs in a country that is a party to the CSC, companies that supplied components, materials or services to that facility will be protected against liability as follows. The first tier is the CSC country's own law, channelling liability exclusively to the operator and requiring a "pool" of financial protection (normally insurance) totalling at least 300 million special drawing rights (currently equal to about $420 million).

If the nuclear damage claims exceed the first tier insurance pool, in the second tier a CSC country is entitled to ask other CSC countries to pay supplementary compensation.

The CSC also channels jurisdiction over claims for nuclear damage (as required by Article XIII(1)) exclusively to the CSC country in which the nuclear incident took place, so the only courts in CSC countries that have jurisdiction are those of the CSC country where the incident occurred.

The US Department of Energy estimates its government's share of supplementary compensation at about $150 million if the 30 countries that operate nuclear plants in 2014 have joined the CSC when a nuclear incident occurs in a CSC country. But the nuclear damage claims following the destruction of the reactors at Fukushima Daiichi total many billions of US dollars. The national first tier insurance pool, plus the CSC's supplementary compensation, would likely satisfy only a small fraction of the total claims for nuclear damage in the event of a major accident. As is illustrated by a lawsuit filed in the USA following Fukushima, those who claim nuclear damage may file lawsuits in countries other than the country where the nuclear incident took place.

That lawsuit was filed against Tokyo Electric Power Company (Tepco) in a US District Court in California by approximately 80 plaintiffs, who say they sustained health injuries from radiation exposure while aboard US Navy ships and helicopters that flew over Fukushima Daiichi while providing assistance. On 18 November, plaintiffs amended their complaint to include, as defendants, not only the lead supplier of the reactors but also architect engineers and other suppliers. The court has not yet ruled on Tepco's motion to dismiss the plaintiffs' third amended complaint, or its motion for reconsideration of the judge's order denying Tepco's previous motion to dismiss. If the court denies these motions and other defendants' motions to dismiss the complaint, the court presumably will schedule the case for a jury trial.

## Gaps and fears of reimbursement

Given that the financial protection required by national law, plus the CSC supplementary compensation, are inadequate in the event of a major incident, the CSC's most significant protection to nuclear vendors is its channelling of jurisdiction. But this will be far from complete when the CSC enters into force in April. Gaps remain where a country that was not a party to the CSC at the time had a nuclear accident; or where vendors are sued in countries that are not parties to the CSC.

These gaps have been acknowledged by a US DOE spokesman, who said: "a global nuclear liability regime must attract broad adherence from both countries that use nuclear power to generate electricity…and countries that do not use nuclear power to generate electricity." The IAEA's International Expert Group on Nuclear Liability has explained the consequences of such a gap: "[E]ven the nuclear liability conventions cannot achieve the desirable procedural concentration of claims if only a few states are contracting parties to the conventions, since outside the convention

States' national jurisdiction rules remain in force, so that victims may choose between the courts of the non-convention State and the court having jurisdiction under the applicable convention. The intended effects of the procedural channelling can therefore only be reached if many — at best all — states become convention states."

A second concern is that the US DOE has proposed a rule that would require certain US nuclear vendors to reimburse the US government for its payment of the US share of supplementary compensation required by the CSC.

Congress imposed severe constraints, (Section 934, Energy Independence and Security Act 2007) on the allocation of contingent costs under the CSC so that US nuclear suppliers must reimburse the government for the US share of any supplementary compensation payments. To comply with Section 934, DOE's final rule must identify classes of suppliers and calculate their shares, so the total contributions will equal the US government's share of supplementary compensation payments.

Many US vendors are dismayed by DOE's proposed rule. Blame must be assigned, in my view, to the US Congress, which failed to recognise that payment of the US share of the CSC's supplementary compensation is a sovereign responsibility that should not be shifted to US nuclear vendors. Congress justified its action by concluding that the CSC benefitted US vendors, but it overstated the protection that vendors will have.

No other country to date has imposed this responsibility on vendors. When a country becomes party to an international agreement, such as a treaty or convention, the responsibility to perform its obligations rests on each of the sovereign nations that are parties. Since the CSC's obligations are inherently sovereign obligations and its benefits do not exclusively flow to US nuclear vendors, it is difficult to understand why Congress thought that the vendors should solely bear the obligation to reimburse the US government for its payment of supplementary compensation.

The obligations of the USA under the CSC are not contingent on DOE's rule. Since the USA has ratified the CSC and will be a party when it enters into force, the US government will be required to pay its share of supplementary compensation required by the CSC, regardless of whether DOE has promulgated a final rule. However, DOE's final rule will impose a substantial contingent liability upon vendors of some types of products and services. It essentially requires US suppliers to participate in a "zero sum game".

Industry comments may cause DOE to revise its proposed rule, with some categories of suppliers' financial responsibility reduced or eliminated and others increased. Eventually some US industry participants may decide to challenge DOE's final rule, by bringing a lawsuit or lobbying congress to revise the law.

Since the CSC will soon enter into force, this is a good time for nuclear suppliers to reassess their nuclear liability protection with respect to their past supply to nuclear facilities and new supply contracts that they may desire to execute in the future. Vendors should assess the risk of being sued in all countries in which they are organised or do business.

**Ministry of External Affairs' answers to frequently asked questions concerning India's Civil Liability for Nuclear Damage Act (CLND)**

| Questions | Answers |
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| Has India agreed to amend its Civil Liability for Nuclear Damage Act of 2010 (CLND) and associated rules? | There is no proposal to amend the Act or the rules. |
| Does India intend to become a party to the CSC? | Yes. India has "signed and intends to ratify" the CSC. |
| Is the CLND consistent with the Annex to the CSC in light of section 17(b) and section 46? [§17(b) gives the operator a right of recourse against vendors when such recourse is provided in the vendor's contract and a nuclear incident resulted from an act of supplier.] | Yes. §17(b) merely recognises that "parties to a contract generally...specify their obligations pursuant to warranties and indemnities." |
| Does Section 46 permit claims for compensation for nuclear damage to be brought under statutes other than the CLND Act? [§46 provides that "the provisions of this Act shall be in addition to, and not in derogation of, any other law...in force".] | No. "The CLND Act channels all legal liability for nuclear damage exclusively to the operator and section 46 does not provide a basis for bringing claims for compensation for nuclear damage under other Acts." |

## US-India nuclear liability deal - is it a "breakthrough"?

It is difficult to understand how the Obama administration can characterise new nuclear liability understandings reached by the US and India during the president's recent trip to India as a breakthrough. Though India has apparently agreed to establish a pool of financial protection, it is simply what a country that is establishing or augmenting an nuclear power programme needs to establish in any event.

If India becomes a party to the CSC, as is apparently its intent, India's law must take on CSC requirements, including the operator's financial protection for nuclear third party liability (at least 300 million SDRs, or $420 million).

The White House press briefings did not indicate how the "breakthrough" dealt with the nuclear liability issues raised by sections 17(b) and 46 of India's nuclear liability law. Those sections are the primary sources of the nuclear liability concerns expressed by potential vendors to India's nuclear power programme.

On 8 February, India's Ministry of External Affairs published answers to frequently asked questions regarding the "breakthrough." However, according to the 9 February edition of *The Hindu*, the Ministry's answers regarding section 17(b) and 46 of the CLND have been challenged by several members of India's parliament and Indian sources have stated that "a memorandum from the Indian government doesn't bind the Indian courts or supersede the Statute."

Although the Ministry's FAQ provides its perspective on the "breakthrough," it raises more questions than it answers. Prospective vendors to India's nuclear power programme now face complex legal questions, under India's CLND Act as well as international law, concerning sections 17(b) and 46 and the Ministry's interpretation of those sections. Nuclear suppliers will need to determine whether they agree with the Ministry's conclusion that "the provisions of the CLND Act are broadly in conformity with the CSC and its Annex."

Although the IAEA has various administrative functions under the CSC, its role does not include determining whether a country that joins the CSC has laws that are consistent with the CSC. But the CSC provides that "any Contracting Party whose national law ceases to comply with the provisions of the Annex to this Convention and which is not a Party to either the Vienna Convention or the Paris Convention shall notify the Depositary [the IAEA] thereof and of the date of such cessation. On that date such Contracting Party shall have ceased to be a Party to this Convention." Clearly, if India joins the CSC, the CSC will become part of India's law and India will represent that its laws comply with the requirements of the CSC Annex. If India joins the CSC and other CSC parties do not agree that India's laws meet the requirements of the CSC Annex, they could invoke the CSC's dispute resolution procedures. ■

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