
CONVENTION ON SUPPLEMENTARY COMPENSATION FOR NUCLEAR DAMAGE ENTERS INTO FORCE

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On January 15, 2015, Japan submitted to the International Atomic Energy Agency (IAEA) its instrument of acceptance to the Convention on Supplementary Compensation for Nuclear Damage (CSC), thereby triggering the CSC's entry into force on April 15, 2015. *See* International Atomic Energy Agency, Office of Public Information and Communication, *Convention on Supplementary Compensation for Nuclear Damage Enters into Force* (updated April 17, 2015), *available at* <https://www.iaea.org/newscenter/news/convention-supplementary-compensation-nuclear-damage-enters-force>; International Atomic Energy Agency, *CONVENTION ON SUPPLEMENTARY COMPENSATION FOR NUCLEAR DAMAGE* (updated Apr. 21, 2015), *available at* http://www.iaea.org/Publications/Documents/Conventions/supcomp_status.pdf. The CSC makes a significant additional international fund available to compensate third parties for damages in the event of a nuclear accident, and also introduces restrictions on jurisdiction over incidents involving nuclear installations within the territories of CSC parties. Thus, the CSC will provide some new protections to vendors doing business overseas, although the breadth of these protections will largely depend on how many countries adopt the CSC.

The CSC is, in general, intended to supplement and enhance the existing system of compensation for damages resulting from a nuclear incident, beyond the provisions of the Paris Convention, the Vienna Convention, or national laws for those countries that are not parties to either convention. *See* International Atomic Energy Agency, *INFCIRC/567, CONVENTION ON SUPPLEMENTARY COMPENSATION FOR NUCLEAR DAMAGE, Preamble & art. II* (July 22, 1998), *available at* <http://www.iaea.org/sites/default/files/publications/documents/infircs/1998/infirc0567.pdf>.

In order to enter into force, the CSC required ratification by at least five countries whose

combined nuclear fleets total over 400,000 megawatts thermal (MWt). *See* CSC, art. XX.1. Prior to Japan's ratification, the CSC had been ratified by five countries: the United States, Argentina, Morocco, Romania, and the United Arab Emirates. *See* International Atomic Energy Agency, *CONVENTION ON SUPPLEMENTARY COMPENSATION FOR NUCLEAR DAMAGE* (updated Apr. 21, 2015), *available at* http://www.iaea.org/Publications/Documents/Conventions/supcomp_status.pdf. With the addition of Japan, the installed nuclear capacity of the contracting countries increased to approximately 450,000 MWt, bringing the total capacity over the threshold.

In addition, a number of other countries such as Canada, India, the Czech Republic, and Ukraine have signed, but not ratified, the CSC. *See id.* In 2013, the United States and France agreed to encourage other nations to sign existing nuclear liability conventions, including the CSC. *See U.S.-France Joint Statement on Liability for Nuclear Damage* (Aug. 29, 2013), *available at* <http://iipdigital.usembassy.gov/st/english/texttrans/2013/08/20130830281994.html#axzz3cZq3jaNT>. It remains unclear, however, whether any Western European countries will join the CSC.

In the event of a nuclear incident involving an installation within its borders, each contracting country must make available at least 300 million special drawing rights ("SDRs," approximately US\$ 422 million as of May 21, 2015) as compensation for damages caused by the incident. *See* CSC, art. III. The CSC also provides for an international public fund to supplement the compensation available under national law, in the event damages exceed 300 million SDRs. The contracting countries must contribute to the international public fund in the event of an incident, under a formula specified in the CSC, depending on the installed nuclear capacity of the country and the United Nations rate of assessment for the country. The IAEA offers an online calculator that provides calculated contributions from signatory countries under a given scenario

(i.e., what countries have joined the CSC and where the incident takes place). *See* International Atomic Energy Agency, *Calculator—Convention on Supplementary Compensation for Nuclear Damage* (updated Sept. 2, 2014), available at <http://ola.iaea.org/ola/CSCND/Calculate.asp>.

Like the Vienna and Paris Conventions, the CSC specifies that jurisdiction over damages from a nuclear incident lies only with the courts of the contracting country of the nuclear installation where the incident occurred. *See* CSC, art. XIII. Thus, nuclear vendors can only be sued for damages for a nuclear incident occurring in a foreign country, which is a party to the CSC, in that country's courts, and not in the courts of the vendor's home country.

One significant question is the source of U.S. contributions to the international fund in the event of a nuclear incident. The U.S.-implementing legislation for the CSC, the Energy Independence and Security Act of 2007 (EISA), authorizes the U.S. Department of Energy (DOE) to issue regulations establishing a retrospective risk pooling program, funded by U.S. nuclear suppliers, to cover U.S. obligations under the CSC for a nuclear incident not covered by the Price-Anderson Act (in general, an incident occurring outside of the United States). *See* Energy Independence and Security Act of 2007 § 934, 42 U.S.C. § 17373. This statute requires DOE to develop a risk-informed assessment formula to allocate retrospective contributions among U.S. suppliers for events outside the United States not covered by Price-Anderson. The other parties to the CSC do not impose this type of burden on their nuclear suppliers.

In December 2014, DOE published a Notice of Proposed Rulemaking (NOPR) on contingent cost allocation for U.S. obligations under the CSC. *See* Notice of Proposed Rulemaking, Convention on Supplementary Compensation for Nuclear Damage Contingent Cost Allocation, 79 Fed. Reg. 75,076 (Dec. 17, 2014). Some of the challenges associated with this NOPR include

(1) how to define the class of nuclear suppliers liable for potential retrospective premiums; (2) how to fairly allocate retrospective contributions among U.S. suppliers under the EISA's "risk-informed" assessment formula without imposing a burden on suppliers that is disproportionate to their risk exposure; and (3) whether and how DOE will provide information to suppliers to allow them to quantify their potential liabilities. On the last point, suppliers will have difficulty obtaining insurance for CSC liabilities if they cannot quantify their risk exposure. The NOPR also proposes to require suppliers to develop extensive initial reports of nuclear exports, in some cases covering transactions dating back to 1960, and would require reports of exports to any country—regardless of whether that country has any prospect of acceding to the CSC. These reports would be burdensome for suppliers, especially given the contingent nature of the liability and the relatively small size of any individual supplier's potential contribution.

Several stakeholders have submitted comments on the NOPR. The comments include proposals for DOE to collect further information to develop a supplemental proposed rule addressing these challenges. Most significantly, the EISA itself appears to impose an uneven burden on U.S. nuclear suppliers, who are being asked to furnish the potential U.S. contribution to the CSC's retrospective fund, when suppliers from other nations would not have such liabilities. This uneven burden arguably undercuts the purposes of U.S. accession to the CSC, which include facilitating—not discouraging—the participation of U.S. suppliers in the global nuclear marketplace.

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