109TH CONGRESS
2d Session

SENATE

EXEC. REPT.
109–15

CONVENTION ON SUPPLEMENTARY COMPENSATION FOR NUCLEAR DAMAGE (TREATY DOC. 107–21)

JULY 28, 2006.—Ordered to be printed

Mr. LUGAR, from the Committee on Foreign Relations, submitted the following

R E P O R T

[To accompany Treaty Doc. 107–21]

The Committee on Foreign Relations, to which was referred the Convention on Supplementary Compensation for Nuclear Damage, done at Vienna on September 12, 1997, and signed by the United States on September 29, 1997 (Treaty Doc. 107–21), having considered the same, reports favorably thereon with a declaration and a condition as indicated in the resolution of advice and consent, and recommends that the Senate give its advice and consent to ratification thereof, as set forth in this report and the accompanying resolution of advice and consent.

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I. PURPOSE

The Convention on Supplementary Compensation for Nuclear Damage would create a legal framework for defining, adjudicating and compensating civil liability resulting from covered nuclear incidents that is consistent with the existing U.S. nuclear civil liability system. In addition, it would establish an international supplementary compensation fund in the event that such an incident exhausts the funds made available, in accordance with the Conven-

tion, by the party in which the incident takes place. It is the first convention in this area with the potential for global application.

II. BACKGROUND

There are currently two multilateral treaties in force relating to civil liability for nuclear incidents: the Vienna Convention on Civil Liability for Nuclear Damage ("Vienna Convention")[1] and the Paris Convention on Third Party Liability in the Field of Nuclear Energy ("Paris Convention").[2] Neither of these treaties has been adopted globally. Nor is the United States—the world's largest nuclear power generator—a party to these international instruments, as they would require significant changes to the U.S. tort liability system.

Because the United States is not a party to any nuclear civil liability convention, U.S. suppliers of nuclear technology face potentially unlimited third party civil liability arising from their work in foreign markets. This potential liability limits commercial opportunities for these U.S. companies, as well as their participation in the provision of safety assistance to Soviet-designed nuclear power plants that would help decrease the risk of future accidents in such plants. Moreover, the absence of a global system has left many potential victims of nuclear accidents outside of the United States without assurances of prompt and adequate compensation.

In order to address these two significant concerns related to nuclear power—victim compensation and industry liability—the United States worked with the international community to draft the Convention on Supplementary Compensation for Nuclear Damage ("CSC" or "Convention"). The CSC was adopted on September 12, 1997, in Vienna at the 41st General Conference of the International Atomic Energy Agency ("IAEA"), and signed by the United States on September 29, 1997, the day it was opened for signature. On November 15, 2002, the President transmitted the CSC to the Senate for advice and consent to ratification.

The Convention is open to any state that is a party to either the Vienna Convention or the Paris Convention, or that declares that its national law complies with the provisions of the Annex to the CSC. The Annex was designed to permit the United States to join the Convention without making substantive changes to the Price-Anderson system (the U.S. domestic system for compensation for nuclear damage). In addition, any state with a nuclear installation as defined in the Convention on Nuclear Safety (a separate treaty to which the United States is a party) must also be a party to that convention in order to become a party to the CSC. The CSC will enter into force 90 days after at least five States with a minimum of 400,000 units of installed nuclear capacity have deposited an instrument of ratification, acceptance or approval with the IAEA. To date, 13 countries have signed the CSC, and Argentina, Romania, and Morocco have ratified it.[3]

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[1] Further information on the Vienna Convention may be found at http://www.iaea.org/Publications/Documents/Conventions/liability.html.

[2] Further information on the Paris Convention may be found at http://www.nea.fr/html/law/nlparis_conv.html.

[3] CSC Ratification Status can be found at: http://www.iaea.org/Publications/Documents/Conventions/supcomp_status.pdf.

III. Summary of Key Provisions of the Protocol

The CSC contains two main elements: a harmonized system of civil liability for nuclear accidents; and an international supplementary fund to compensate victims of such accidents in the event that such an incident exhausts the funds made available, in accordance with the Convention, by the party in which the incident takes place.

Liability System

The CSC requires parties to adopt harmonized nuclear liability laws conforming with certain basic principles already in use in the United States under the Price-Anderson Nuclear Industries Indemnity Act of 1957 (42 U.S.C. § 2210) ("Price-Anderson Act").[4] The operator of the nuclear installation is liable for damage caused by a nuclear incident occurring at its facility. Once causation is proved, the operator is strictly liable for the damage, avoiding the need for protracted litigation over fault. All claims resulting from a nuclear incident are to be resolved in a single forum, generally the courts of the party in whose territory the incident occurs.

Compensation

The CSC creates a two-tiered system of compensation for damage caused by nuclear incidents. The first tier of compensation is set at 300 million Special Drawing Rights ("SDRs"),[5] currently worth approximately $450 million, and is to be provided by funds made available under the laws of the installation state.[6] Under a transition period in effect until 2007, parties may declare a lower first tier amount, but it must be at least 150 million SDRs (approximately $225 million), after which the 300 million SDR requirement applies.

A second tier of compensation, to be drawn on by the installation state to compensate victims of a nuclear incident in the event that the first tier funds are exhausted, is provided by an international supplementary compensation fund made up of contributions by the parties. Approximately ninety percent of the contributions are assessed based on the nuclear power generating capacity of each party, with the rest based on the United Nations assessment on each party. Should all major nuclear power generating states participate in the CSC, the supplementary fund would total over 300 million SDRs. The United States portion of this amount would be

[4] The Price-Anderson Act has been renewed numerous times, most recently in 2005 through the Energy Policy Act, which extended it through 2025. The Act requires operators of nuclear power plants to obtain the maximum possible private insurance coverage against accidents and provides for a retrospective pooling arrangement among all operators to cover any claims in excess of the private insurance. Thus, the Price-Anderson Act effectively channels all economic liability to the operators of nuclear power plants. Thus far, a total of $151 million has been paid to cover claims (including legal expenses), all from primary insurance, including $70 million for the Three Mile Island incident. The Price-Anderson Act channels all economic liability to the Department of Energy with respect to accidents resulting from activities on its behalf.

[5] SDRs are used by the IMF and represent a basket of currencies including the US dollar, the British pound, Japanese yen and Euro. On July 17, 2006, one SDR equaled approximately $1.47. Daily SDR rates can be found on the IMF's webpage: http://www.imf.org/external/np/fin/rates/param—rms—mth.cfm.

[6] Article I paragraph (e) defines "installation state," as "in relation to a nuclear installation . . . the Contracting Party within whose territory that installation is situated or, if it is not situated within the territory of any State, the Contracting Party by which or under the authority of which the nuclear installation is operated."

approximately 100 million SDRs, as the United States has about one third of the world's nuclear generating capacity. The CSC contains a capping mechanism that, during the period between entry into force and participation by most major nuclear power generating states, would operate to limit the United States contribution to an amount lower than what would otherwise result from application of the formula in the CSC for calculating the contribution from a party.

Key Provisions

A detailed article-by-article discussion of the Convention may be found in the Letter of Transmittal from the Secretary of State to the President, which is reprinted in full in Treaty Document 107–21. A summary of the key provisions of the Convention is set forth below.

Article I of the CSC defines the "nuclear damage" that is subject to compensation under the Convention. Loss of life, personal injury, and property loss or damage are compensable, while certain other types of damage—the costs of environmental reinstatement, loss of income due to environmental damage, the costs of preventive measures taken to mitigate damage from an imminent or actual nuclear incident, and any other economic loss recognized by the civil liability law of the competent court—are compensable "to the extent determined by the laws of the competent court." With the exception of preventive measures, only damage arising out of or resulting from the release of ionizing radiation is covered. Preventive measures and measures of reinstatement relating to impairment of the environment must be "reasonable," which is defined as those measures "found under the law of the competent court to be appropriate and proportionate, having regard to all the circumstances."

Article II provides that the purpose of the Convention is to supplement the compensation available under the national law of a party that implements the Vienna Convention or the Paris Convention, or that complies with the Annex to the CSC. It also establishes that the Convention applies "to nuclear damage for which an operator of a nuclear installation used for peaceful purposes situated in the territory of a Contracting Party is liable" under the Vienna Convention, the Paris Convention, or national law that complies with the Annex.[7] "Nuclear installation used for peaceful purposes" excludes military facilities from coverage. Each party is to decide which of its installations are used for peaceful purposes. The executive branch, in response to questions for the record from the Committee, explained that nuclear installations operated by the Department of Defense will be excluded from coverage of the Convention under this provision, as will Department of Energy facilities "that prepare nuclear material or equipment to utilize nuclear material for use by the Department of Defense, or that receive such material and equipment from the Department of Defense, unless or

[7] "Nuclear installation" is to be defined in accordance with each party's domestic law, which must be based on the Vienna Convention, the Paris Convention, or the Annex to the CSC. The executive branch has indicated to the Committee that the United States, pursuant to the Annex, uses an alternative definition that is "explicitly restricted to civil facilities that are reactors or facilities for processing or storing spent fuel, or certain products or waste that pose a significant risk (for example high-level radioactive waste)."

until such material and equipment are transferred permanently to and managed within exclusively civilian programs."

Article III contains the central obligation under the CSC: that each party with one or more nuclear installations ensure the availability of compensation in case of a nuclear incident with respect to which it is the installation state. Paragraph 1(a) obligates the installation state to ensure the availability of at least 150 million SDRs until September 29, 2007, thereafter increasing to 300 million SDRs.[8] These funds are to constitute the first tier of compensation available in the event of a nuclear incident. Paragraph 1(b) establishes the obligation on all parties to the CSC to make available public funds to the international supplementary compensation fund as specified in Article IV, which makes up the second tier of compensation. Paragraph 2(a) requires that first tier funds be distributed equitably without discrimination on the basis of nationality, domicile or residence so that transboundary victims are treated the same as domestic residents. The installation state may, if consistent with its international obligations, exclude damage suffered in a non-party state from the first tier of compensation. Paragraph 2(b) subjects the international supplementary fund to the same non-discrimination requirement, subject to Article V (which determines the geographical scope within which damage must occur in order to be eligible for compensation from the fund) and Article XI(1)(b) (which reserves 50 percent of the international fund for the compensation of transboundary damage). Paragraph 3 reduces contributions to the fund proportionately among the contributing parties if the damage compensated does not use up the entire fund. Paragraph 4 creates a separate category of interest and costs that may be assessed by a competent court, and it allocates proportionately any such interest and costs among the various possible contributors to the first two tiers, which may cause their total contributions to exceed the contribution caps established by the CSC.

Article IV establishes the formula for calculating each party's contributions to the international supplementary fund. Paragraph 1(a)(i) assesses 300 SDRs per unit of installed capacity, which is defined in Paragraph 2 as one megawatt of thermal power. Paragraph 1(a)(ii) assesses an additional amount equal to 10 percent of the amount assessed in (i), to be contributed by all parties on the basis of the ratio between their United Nations rate of assessment and the total of such rates for all CSC parties. Subparagraph (c) caps the contribution for each party, other than the installation state, at a percentage equal to its U.N. rate of assessment plus eight percentage points.[9] The cap could result in a temporary reduction of the total value of the fund until a sufficient number of states have joined the CSC, but is meant to encourage the major

[8] The executive branch has indicated in response to Committee questioning that the United States would ensure that 300 million SDRs is available as a first tier of compensation to victims of nuclear incidents covered by the CSC with respect to which the United States is the installation state.

[9] Under this formula, the U.S. contribution would be capped at 30 percent of the total contributions from all CSC parties calculated without reference to the cap. For example, in a situation where total contributions would be 150 million SDRs from all CSC parties including 100 million SDRs from the United States without reference to the cap, the cap would limit the contribution from the United States to 45 million SDRs and the actual total contribution from all countries including the United States to 95 million SDRs.

nuclear power generating countries to ratify the CSC by reducing the disproportionate financial burden they might otherwise have to shoulder at the outset in the absence of such a cap. The cap begins to phase out once countries representing 625,000 MW have ratified the CSC.

Article V specifies the geographic limitations for recovery from the international supplementary fund. Nuclear damage is covered if suffered within the territory of a party or over its exclusive economic zone ("EEZ") or continental shelf in connection with the exploitation or exploration of the natural resources of the EEZ or continental shelf. The CSC also covers nuclear damage occurring in maritime areas beyond the territorial sea of any party (but outside the territorial sea of any non-party), where the damage is suffered (a) by a national of a party (including, at the option of each party, habitual residents); (b) on board or by a ship flying the flag of a party; (c) on or by an aircraft registered in a party; or (d) on or by an artificial island, installation or structure under the jurisdiction of a party. Paragraph 3 clarifies that the term "national of a Contracting Party" includes juridical and natural persons, as well as the party itself or any of its political subdivisions.

Article VI obligates the party whose courts have jurisdiction over claims to notify the other parties if it appears that the damage caused by an incident is likely to exceed the party's first tier amount, thus requiring contributions to the international supplementary fund. Following such notification, parties are obligated immediately to make arrangements for providing the necessary funds.

Article VII provides that the party whose courts have jurisdiction shall have exclusive jurisdiction to disburse these funds to victims.

Article VIII sets up a system for creating and maintaining a register of nuclear reactors for the purpose of calculating the contributions required of each party to the international supplementary fund.

Article IX requires each party to enact legislation permitting it or other parties, to the extent they have made contributions to the international supplementary fund, to benefit from any right the operator may have to recover damages from a third party. U.S. law does not provide a right of recourse to a nuclear operator unless explicitly provided in a private contract between the operator and the other party to the contract.

Article X provides that the court of the party that has jurisdiction over the nuclear incident shall establish the system of payments of funds under Article III(1), and that claimants will not be required to bring separate proceedings to recover from both the national and the international supplementary funds. Paragraph 3 guarantees that no party will be asked to contribute to the international supplementary fund unless first tier funds are insufficient to cover all claims.

Article XI allocates the international supplementary fund as follows: one half is allocated to compensate for damage incurred in all parties without differentiation; the other half is available for the compensation of transboundary damage. If less than 300 million SDRs are available under the first tier, the proportion of the international supplementary fund available for transboundary damage is increased proportionately to cover the difference. Paragraph 2

provides that, in cases where more than 600 million SDRs are available in the first tier, the specific allocation for transboundary damage is eliminated and the entire international supplementary fund is available on a non-differentiated basis.

Article XIII defines which court is competent to decide a claim, providing exclusive jurisdiction over claims brought under the CSC to the courts of the party within whose territory (or waters) the incident occurs. If it cannot be determined where the nuclear incident occurred, or the incident occurred outside the territory or EEZ of a party, then the jurisdiction lies with the installation state (i.e., the state under whose authority the installation is operated). The courts of each party are to recognize and enforce the judgments of each other under the CSC unless such judgments result from fraud or are otherwise inconsistent with due process or public policy.

Article XIV specifies that the law of the party whose court is competent, whether based on the Paris or Vienna Conventions or the CSC Annex, as appropriate, is to be applied to all claims related to a specific nuclear incident.

IV. Implementing Legislation

The executive branch has submitted to the Congress proposed implementing legislation required for the United States to comply with the Convention's provisions. The CSC will not require substantive changes to the U.S. civil liability system for nuclear damage under the Price-Anderson Act. Under the executive branch proposal, in the event of a nuclear incident in the United States covered by the Convention, the first tier of compensation required under the Convention would be funded through the Price-Anderson system. With respect to a nuclear incident covered by the Price-Anderson system, the U.S. contribution to the international supplementary compensation fund, if needed, would be funded by making use of funds already required under the Price-Anderson system in a manner that would not impose any new cost on operators of domestic nuclear power plants or on U.S. taxpayers. With respect to nulcear incidents not covered by the Price-Anderson system, U.S. suppliers of nuclear technology, who stand to benefit from the adoption of harmonized liability rules under the CSC, would bear the cost of a U.S. contribution to the international supplementary compensation fund, if needed; U.S. taxpayers will not be asked to contribute to this fund.

V. Committee Action

The Committee held a public hearing on the Convention on September 29, 2005, in which it heard testimony from representatives of the Departments of State and Energy (a transcript of this hearing and questions and answers for the record may be found in S. Hrg. 109–324). On May 23, 2006, the Committee considered the Convention, and ordered it favorably reported by voice vote, with a quorum present and without objection, with the recommendation that the Senate give its advice and consent to its ratification subject to one declaration and one condition, as set forth in this report and the accompanying resolution of advice and consent to ratification.

VI. Committee Recommendation and Comments

The Committee on Foreign Relations believes that the Convention presents a significant opportunity to create a global nuclear civil liability regime compatible with the existing U.S. nuclear civil liability law. Such a system would be beneficial to U.S. interests in several ways. It would limit the liability now facing United States suppliers of nuclear technology with respect to their activities in foreign markets, leveling the playing field for them and bringing more predictability to the market. It would also encourage improvements in civilian nuclear plant safety overseas by helping U.S. companies export nuclear safety technology to foreign nations. At the same time, the CSC's creation of a supplementary international fund is expected to help ensure that potential victims of a civil nuclear incident overseas will be adequately compensated. The Committee urges the Senate to act promptly to give advice and consent to its ratification.

The Committee has included one declaration and one condition in the resolution of advice and consent to ratification. The declaration relates to dispute settlement. Article XVI provides for the Parties involved in a dispute over the interpretation or application of the CSC, following 6 months of consultations, to submit the dispute to binding arbitration or to the International Court of Justice. Paragraph 3 of the article allows Parties to opt out of either or both of these dispute settlement procedures by submitting a declaration to this effect, at the time of ratification, acceptance, approval or accession. The Executive Branch has recommended, and the Committee has included in the resolution of advice and consent, a declaration opting out of both of these dispute settlement procedures.

The condition calls for reports by the Secretary of State. The CSC will only prove to be beneficial to U.S. nuclear suppliers and potential victims if there is broad international adherence to it. Because the Committee believes that widespread adoption of the CSC is important, it has included in the resolution of advice and consent a condition that the Secretary of State report to the Congress on: the number of parties to the Convention; a description of their legislation implementing Article III of the Convention, which contains the obligation to contribute to the international supplementary compensation fund; and United States diplomatic efforts to encourage other countries to become parties. The first report would be due no later than six months following entry into force of the Convention for the United States, with annual reports thereafter for four years.

VII. Resolution of Advice and Consent to Ratification

Resolved (two-thirds of the Senators present concurring therein),

SECTION 1. SENATE ADVICE AND CONSENT SUBJECT TO DECLARATION AND CONDITION.

The Senate advises and consents to the ratification of the Convention on Supplementary Compensation for Nuclear Damage, done at Vienna on September 12, 1997 (Treaty Doc. 107–21), subject to the declaration in section 2, and the condition in section 3.

SECTION 2. DECLARATION.

The advice and consent of the Senate under section 1 is subject to the following declaration, which shall be included in the United States instrument of ratification:

As provided for in paragraph 3 of Article XVI, the United States of America declares that it does not consider itself bound by either of the dispute settlement procedures provided for in paragraph 2 of that Article, but reserves the right in a particular case to agree to follow the dispute settlement procedures of the Convention or any other procedures.

SECTION 3. CONDITION.

The advice and consent of the Senate under section 1 is subject to the following condition:

Not later than 180 days after entry into force of the Convention for the United States, and annually thereafter for four additional years, the Secretary of State shall submit a report to the Committees on Energy and Natural Resources and Foreign Relations of the Senate, and the Committees on Energy and Commerce and International Relations of the House of Representatives that includes the following:

(A) RATIFICATION.—A list of countries that have become a Contracting Party to the Convention and the dates of entry into force for each country.

(B) DOMESTIC LEGISLATION.—A description of the domestic laws enacted by each Contracting Party to the Convention that implement the obligations under Article III of the Convention.

(C) U.S. DIPLOMACY.—A description of United States diplomatic efforts to encourage other nations to become Contracting Parties to the Convention, particularly those nations that have signed it.

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