

The United States nuclear liability regime under the Price-Anderson Act

O. F. Brown

The 1957 U.S. Price-Anderson Act created the world's first national nuclear liability regime. It now provides US\$12.6 billion of nuclear liability coverage for the 104 nuclear power plants in the United States, by far the highest monetary coverage of any nuclear liability regime in the world. Each power plant operator provides nuclear hazards coverage for anyone liable through a combination of private insurance from the American nuclear insurance pool (now US\$375 million) and a retrospective assessment (now US\$111.9 million per power plant per incident plus 5 percent for claims and costs). The United States in 2008 ratified the International Atomic Energy Agency's Convention on Supplementary Compensation for Nuclear Damage (CSC), and is promoting it as the basis for a more global nuclear liability regime uniting States that are party to the Vienna Convention or the Paris Convention, or have a domestic law consistent with the CSC Annex. The CSC Annex was written to "grandfather" the Price-Anderson Act's "economic channeling" of liability to the installation operator. The "omnibus" feature of Price-Anderson is similar to the "legal channeling" of all liability to the installation operator under the international nuclear liability conventions and domestic laws of many other countries. The Price-Anderson system (like the Vienna and Paris Conventions) does not provide liability coverage for nuclear damage to or loss of use of on-site property.

Con la Ley Price-Anderson de EEUU, aprobada en 1957, se creó el primer régimen nacional de responsabilidad por daños nucleares en el mundo. En la actualidad, con esta ley se disponen de 12,6 mil millones de dólares en concepto de cobertura de responsabilidad por daños nucleares para las 104 centrales estadounidenses; la mayor cobertura monetaria de cualquier régimen de responsabilidad por daños nucleares en el mundo. Cada empresa operadora de las diferentes centrales cubre los riesgos nucleares mediante una combinación de un seguro privado del fondo americano de seguros nucleares (actualmente valorado en 375 millones de dólares) y una evaluación retrospectiva (actualmente 111,9 millones de dólares por central y por incidente, más el 5 % para reclamaciones y costes). En 2008, EEUU ratificó el Convenio Suplementario de Compensación para Daños Nucleares (CSC) del OIEA, y lo está promocionando como base de un régimen global de responsabilidad civil por daños nucleares que reúne a los estados firmantes de la Convención de Viena o la de París, o que tienen una ley doméstica compatible con el Anexo del CSC. Éste se redactó para "excluir" la "canalización económica", prevista en la Ley Price-Anderson, de la responsabilidad civil hacia la empresa operadora de la instalación. La cualidad "ómnibus" de la Ley Price-Anderson es similar a la "canalización legal" de toda la responsabilidad civil hacia la empresa operadora de la instalación de acuerdo con las convenciones internacionales de responsabilidad por daños nucleares y las leyes de otros muchos países. En el sistema Price-Anderson (igual que en las Convenciones de Viena y París), no se prevé la cobertura de la responsabilidad civil por daños nucleares o pérdida del uso de propiedades in-situ.

INTRODUCTION

In enacting the Price-Anderson Act in 1957, the United States created the world's first national nuclear liability regime. At its inception, the Act provided US\$560 million of nuclear hazards liability coverage for power plants and certain other nuclear fa-

cilities. Today, the amount is about US\$12.6 billion for the 104 nuclear power plants in the United States, by far the highest monetary coverage of any nuclear liability regime in the world. Additionally, the United States in 2008 ratified the International Atomic Energy Agency's Convention



OMER F. BROWN

is a Washington, D.C.-based attorney-at-law. His practice emphasizes nuclear energy; risk management for nuclear and ultrahazardous activities; and, related legislation, litigation, and U.S. Government contracts.

In 1972, Mr. Brown was appointed Deputy Attorney General of New Jersey, and served as general counsel to that State's Department of Insurance from 1973 to 1975. He moved to Washington in 1975, and was in private practice until 1979 when he became a Senior Trial Attorney in the Office of the General Counsel at the U.S. Department of Energy. He returned to private practice in 1983. Mr. Brown was graduated from Rutgers University (A.B. 1969) and Cornell University Law School (J.D. 1972). He is a member of the bars of New Jersey, the District of Columbia, and the Supreme Court of the United States.

on Supplementary Compensation for Nuclear Damage (CSC), and is promoting it as the basis for a more global nuclear liability regime uniting States that are party to the Vienna Convention or the Paris Convention, or have a domestic law consistent with the CSC Annex.

The 1957 Price-Anderson Act created a Federal-level regime for handling the consequences of nuclear accidents in the United States. It placed jurisdiction over cases involving "nuclear incidents" in Federal courts, but left the matter of determining liability therefor to the substantive laws of the individual States, just as for other tort cases. To avoid interfering with State tort law by channeling liability exclusively to the plant operator, the Price-Anderson Act created a system

of "omnibus" coverage for "anyone liable" for a nuclear incident. This is what is referred to as "economic" channeling, as opposed to the system of legal channeling of liability to the plant operator (which later would be adopted by other countries and incorporated into the Paris and Vienna Conventions). The CSC Annex was written to "grandfather" the Price-Anderson Act's "economic channeling" of liability to the installation operator, i.e. it makes the United States eligible to be a party to the CSC without changing the Price-Anderson Act to adopt "legal channeling." See CSC, Art. II and CSC Annex, Art. 2.

The Price-Anderson Act generally leaves substantive tort law application vis-à-vis nuclear claims to the States, except (1) courts have ruled Federal radiation protection regulations provide the "standard of care" and (2) when a "nuclear incident" rises to the level of an "extraordinary nuclear occurrence" (in which case, as discussed below, certain ordinarily available State law defenses are waived).

The scope of U.S. Nuclear Regulatory Commission (USNRC)-licensee nuclear hazards liability coverage basically can be determined by reference to the language of Atomic Energy Act of 1954 (AEA) Section 170 and the definitions in AEA Section 11 of key concepts (such as "public liability", "extraordinary nuclear occurrence", "nuclear incident", "person indemnified", "public liability," and "precautionary evacuation").

AMOUNT OF COVERAGE

The Price-Anderson system now works as follows: Each power plant operator provides nuclear hazards coverage for anyone liable through a combination of private insurance from the American nuclear insurance pool (American Nuclear Insurers) (ANI) (primary financial protection) (now US\$375 million) and a retrospective assessment (secondary financial protection) (now US\$111.9 million per power plant per incident plus 5 percent for claims and costs, payable in annual installments up to a maximum of US\$17.5 million per power plant per incident). Payments are guaranteed by the U.S. Government, and there is an inflation adjustment every five years. (The most recent inflation adjustment occurred on October 29, 2008.) With 104 nuclear power plants, coverage currently totals about US\$12.6 billion (i.e., US\$375 million plus (104 times US\$111.9 million + 5% for claims and costs)). Coverage

includes reasonable investigation and defense costs within the limit of liability.

"OMNIBUS" FEATURE

Under the unique, so-called "omnibus" feature of the Price-Anderson system, there is coverage for "anyone liable" (except the U.S. Government) for "any legal liability arising out of or resulting from a nuclear incident." Coverage for third-party nuclear liability applies whether or not there is an agreement between the plant operator and its contractors. Under the omnibus feature of Price-Anderson, there is coverage regardless of how liabilities of particular defendants are allocated by tort law, a system in the United States unique to nuclear applications. Illustrative of its effectiveness is that fact that, following the 1979 Three Mile Island accident, one law firm was able to represent all the defendants, including the nuclear power plant operator, designer and manufacturer. The "omnibus" feature of Price-Anderson would facilitate the handling of the defense and avoiding cross-claims among defendants. It is similar to the "legal channeling" of all liability to the installation operator under the international nuclear liability conventions and domestic laws of many other countries.

SCOPE OF "NUCLEAR INCIDENT"

The Price-Anderson Act contains a broad definition of the term "nuclear incident":

The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive or other hazardous properties of source, special nuclear, or byproduct material... 42 U.S.C. §2014q.

"EXTRAORDINARY NUCLEAR OCCURRENCE" FEATURE

The U.S. Congress amended Price-Anderson in 1966 to require those covered to waive certain legal defenses to actions in the event of an "extraordinary nuclear occurrence" (ENO). The waiver remains an often misunderstood feature of the Price-Anderson Act. At the time of the ENO amendment, it was felt that, if recovery of Price-Anderson funds were left entirely to the provisions and principles of State tort law in the event of a major nuclear

accident, many valid claims might be tied up in the courts for years. Particular problems that were anticipated were varying statutes of limitations and the possibility that some States might not apply "strict liability" to a serious nuclear accident. On the other hand, there was considerable resistance to the total displacement of State law by creation of a "Federal tort" for nuclear accidents. The result of this balance of competing factors was the "waiver" system in which entities covered by Price-Anderson are required to waive certain State law defenses (i.e., contributory negligence, assumption of risk, charitable or governmental immunity, unforeseeable intervening causes, and "short" statutes of limitations). As a result of the defenses that would be waived in the event of an ENO, a person suffering nuclear injury would need show only a causal connection between his or her injury or damage. In other words, when there is an ENO, there essentially is a "no-fault," or strict liability, recovery system.

LIMIT ON LIABILITY

Of particular significance is the Price-Anderson Act's statutory limitation of liability: The Act provides that the aggregate liability of all entities covered by it is limited to the amount of coverage provided by the system for nuclear incidents inside the United States. 42 U.S.C. §2210e. The constitutionality of this feature of the Act was upheld unanimously by the U.S. Supreme Court in 1978. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978). The Court in *Duke Power* found the statute provides a fair and reasonable substitute for the state tort law remedies it replaced.

TRANSPORTATION AND GEOGRAPHICAL SCOPE

The Price-Anderson system covers "nuclear incidents" within the United States causing bodily injury or property damage within or outside the United States. It covers transportation of nuclear materials to and from covered facilities within the United States (including the portion of transportation to or from a foreign facility that occurs in the United States). It further covers any occurrence outside both the United States and any other nation, if such arises in connection with nuclear material moving outside the territorial limits of the United States in transit to and from persons licensed by USNRC. US\$500 million of coverage is provided for nuclear in-

cidents outside the United States where the nuclear material is owned by and used by or under contract with the United States.

ON-SITE PROPERTY

The Price-Anderson system (like the Vienna and Paris Conventions) does not provide liability coverage for nuclear damage to or loss of use of property that is located at a USNRC-licensed site. USNRC licensees historically have purchased nuclear property insurance to cover losses to on-site property or have self-insured. Originally, most nuclear property insurance coverage was provided by the U.S. nuclear insurance pool (ANI (or its predecessors)). Some years ago, some nuclear power plant operators formed their own mutual insurance company (now known as Nuclear Electric Insurance Limited (NEIL)), which currently provides most of the nuclear property insurance written in the United States.

COVERAGE FOR TERRORIST ACTS

The events in the United States on September 11, 2001 gave rise to concerns about terrorism and nuclear damage coverage. "Public liability" is defined in the Price-Anderson Act as "any legal liability arising out of or

resulting from a nuclear incident or precautionary evacuation...." 42 U.S.C. §2210(w). The only exceptions in that definition are for worker's compensation claims, "claims arising out of an act of war," and claims for damage to on-site property at a licensed nuclear facility. Thus, the only way an act of terrorism would be excluded under Price-Anderson would be if it were found to have been an "act of war." With respect to the act-of-war exception, the 1957 Report of the Congressional Joint Committee on Atomic Energy accompanying the original Price-Anderson legislation said:

...This exception to some extent parallels the exception in the private policies. It was thought that in the event of war the damages would be so great and the task of proving causation so difficult that further congressional study would be needed. This exception was not drawn to damage caused by a declaration of war since the first attack on the United States could be an unannounced attack before any declaration of war. Any single act of sabotage would be covered by the indemnification provisions of the bill if it could not be proven to be an act of war.

S.Rep. No. 296, 85th Cong., 1st Sess. 18 (1957), reprinted in 1957 U.S.Code Cong. & Ad. News 1803, 1819.

At the time the U.S. Congress was considering the 1975 amendments to

the Price-Anderson Act, the USNRC prepared a detailed study concerning financial protection against potential harm caused by sabotage or theft of nuclear materials. One of the reasons for the study cited in the USNRC Staff Report was "increased terrorist activity," even then referred to as "a risk that is becoming increasingly common on the world scene." As to the act-of-war exclusion, the USNRC Report said:

Generally speaking...this exclusion appears to contemplate a relatively widespread and actual disruption of the civil order. [citation omitted] The mere fact that a group of terrorists may label themselves "revolutionaries" would not necessarily make their actions a "revolution" within the meaning of this exclusion.

The USNRC study concluded that payment for damages otherwise covered by Price-Anderson is not precluded simply because the damages were caused by an illegal act of sabotage or theft. Illustrating with specific examples, USNRC stated unequivocally that an act of sabotage at a reactor site would be covered by the system, as would sabotage of a materials shipment (e.g., spent fuel from a reactor) "while the shipment was in a planned transportation route." ■

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