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Nuclear Industry Association response to the Department of Energy and Climate Change's public consultation into the implementation of changes to the Paris and Brussels Conventions on nuclear third party liability.

The Nuclear Industry Association (NIA) welcomes this opportunity to comment on the Government's proposals for implementing the changes to the Paris and Brussels conventions.

NIA is the trade association and information and representative body for the civil nuclear industry in the UK. It represents over 250 companies operating in all aspects of the nuclear fuel cycle, including the current and prospective operators of the nuclear power stations, the international designers and vendors of nuclear power stations, and those engaged in decommissioning, waste management and nuclear liabilities management. Members also include nuclear equipment suppliers, engineering and construction firms, nuclear research organisations, and legal, financial and consultancy companies.

Several of these companies, particularly the current operators and those involved in the new build consortia, will be making their own submissions to this consultation.

This response has been put together by the NIA's Legal Affairs Working Group, which convened a subgroup for the purpose. This group included representatives from a number of professional services companies including lawyers, insurers, new build utilities, and tier 1 contractors.

Nuclear Industry Association
28 April 2011

Nuclear Industry Association

Legal Affairs Working Group

Liability Sub Group

Response to:

DEPARTMENT OF ENERGY & CLIMATE CHANGE

Public Consultation on the implementation of changes to the Paris and Brussels Conventions on nuclear third party liability (January 2011)

INTRODUCTION

In August 2010 the Department of Energy and Climate Change (DECC) made available to the Nuclear Industry Association (NIA) its Working Papers on the proposed implementation of changes to the Paris and Brussels Conventions on nuclear third party liability.

Kevin Smith, the Co-Chair of the NIA Legal Affairs Working Group, circulated the Working Papers to its Members for comment and subsequently, on the basis of the responses received, responded to DECC on behalf of the NIA on 30 September 2010. A copy is attached at Appendix 1.

In January 2011 the full DECC Public Consultation ("Consultation") was launched.

The Legal Affairs Working Group believed it was important to participate actively in this consultation to ensure the views of NIA members as a whole were represented. It therefore set up a specially convened Liability Sub Group to address and respond to the Consultation.

The following paragraphs respond to each of the questions set out in the consultation document. We refer throughout this document to the Nuclear Installations Act 1965 as "the Act" and consolidated texts or the Paris and Brussels Conventions as "the Convention".

EXECUTIVE SUMMARY

The NIA recognises that it is not at all easy to amend the Act to introduce new legislation some 45 years after it was compiled. The Act is not easy to comprehend and in many ways does little to assist the aims of the Convention to make matters simpler for victims. It is in places difficult to understand and unclear.

Against this background the NIA would welcome in due course a revision to the entire legislation. The NIA acknowledges that this is not currently possible under the Energy Act 2004.

Our key points in response to the consultation are as follows:

Chapter 4 Categories of Damage

- We welcome the fact that the changes to the Act are not retrospective
- The court should decide whether impairment is significant.

- The proposed clarification of the nuclear damage definitions will give both operators and the providers of operators' financial security greater certainty.
- Government should reconsider providing guidance on 'direct economic interest', which would provide certainty to both operators and victims.
- Providing definitions of phrases such as 'grave and imminent threat' could be helpful.

Chapter 6 Limitation Periods

- It is unlikely the 30 year period will be available from the Risk Transfer market
- This could leave UK site licence holders at a disadvantage in comparison to other EU countries where Governments have implemented the changes but decided to provide an indemnity where financial security is not available.

Chapter 8 Financial Liability Limits

- Insurance is likely to be available to cover a €1,200m limit
- The likely impact is a matter for the existing and new build operators
- The proposed changes will increase their costs
- Consideration should be given to extending the ambit of the 'low risk sites' group to those sites which no longer have fuel on them, and where the insured sum of £70m should be more than sufficient to cover any claims.

Chapter 9 Availability of Insurance/financial Security

- Some of the potential liabilities that Government is proposing to impose on operators will be uninsurable, including liability for bodily injury claims in the 10 to 30 year period after an accident.
- The most practical way to deal with these is to protect the operators by risk transfer to Government as suggested in section 9.23. The charge should be established on an actuarial basis.
- Risk that the use of alternative financial security instead of insurance might not be economically feasible.

Chapter 11 Nuclear Waste Disposal Facilities

- A decision to permit radioactive waste facilities to deal with specified low activity level material would require regulation that might necessitate fresh primary legislation.

Chapter 12 Representative actions

- Appropriate gate keeping mechanisms should be established to prevent spurious claims
- The 'loser' pays principle should remain a possibility for such claims
- Provisions should be made for a Claim Ombudsman/Court Representative
- Provisions should be made to allow the Court to exercise its discretion not to allow certain representative actions to proceed

This is a complicated area and NIA would like to thank the team at DECC for a clear and well presented Consultation. Nonetheless there is clearly work still to be done in planning the implementation of changes, as well as a potentially useful opportunity to simplify this particular area of law. The NIA would be happy to contribute to this work following the consultation.

In this context the NIA's Legal Affairs Working Group has considered the terms of the **draft order** and would welcome a meeting with DECC to provide comments upon it once broad decisions on principles have been made by Government.

The NIA would like to record it's thanks to all those who contributed to the drafting and reviewing of this response to the Government's consultation.

CHAPTER 4 CATEGORIES OF DAMAGE

Questions for Chapter 4:

(a) **Q – We would welcome views on our proposed implementation of the new categories of damage as described in this chapter and as set out in the draft Order.**

(b) **Particular questions you may wish to consider include:**

(i) **should particular types of claim be prioritised, and if so, how (see paragraph 4.14)**

(ii) **should we make provision to deal with the case where a claim is made by a public authority for the cost of reinstating property in respect of which compensation has already been paid to the owner (see paragraph 4.29)**

(iii) **should "compensatory remediation" be expressly included or excluded from the measures of reinstatement that can be claimed for (see paragraph 4.39)**

(iv) **should we define what constitutes a "grave and imminent threat" and, if so, how (see paragraph 4.66)?**

RESPONSE

Economic loss arising from personal injury or property damage

It is stated in paragraph 4.19 of the Consultation that no amendments are required to the Act as it currently exists to implement this new category of damage as set out in a) vii) 3 of Article 1 to the Convention. We agree with this statement and believe this is supported by UK case law.

Costs of measures of reinstatement of impaired environment

We do not consider that this new category of damage, which is set out in a) vii) 4 of Article 1 to the Convention, is only aimed at those who incur expense reinstating the environment in the public interest. It is interesting to note that such a restriction does not appear in the Convention.

We believe that there may well be instances where a potential claimant cannot recover a loss as damage to property but may be liable to remediate land under Part 2A of the Environmental Protection Act 1990 – particularly where the property in question is chemically, rather than radioactively, contaminated as a result of a breach of duty. The fact that the measures to be taken are to be approved by the Secretary of State could lead to a conclusion that the Convention contemplates that any person might be able to make a claim under this new head of damage. It seems strange to say that only public bodies could claim under this head and then say that the measures themselves would have to be approved by what is effectively another public body.

In our view it would be possible for both a public body and an individual to claim under this head in respect of the same incident but the claims would not be in respect of the same loss. It is reasonable to assume that a public body may wish to carry out more extensive measures than an individual so, provided that such measures still fell within the definition of "reasonable measures", then the public body should be able to claim for the costs of taking them.

The Consultation clearly states that for impairment to be treated as significant it must at least be of such a degree as to be eligible for compensation for property damage. We believe that this is an over-complication and that damage to the environment cannot always be treated like damage to property. It should be for the court to decide in each case whether the impairment is significant.

Dealing lastly with the provisions of paragraph 4.44 of the Consultation, we believe that the effect of providing that an application must be made to the Secretary of State for

approval of the measures will be that most parties making such an application will wish to do so before carrying out the measures as they will not want to incur the (usually high) costs of reinstating the impaired environment if they might not be recoverable. Given that any delay in taking the measures might lead to considerable further damage, we consider that it is essential that an effective procedure is put in place for the application for approval with an additional provision for emergencies.

New damage category 5: Loss of income deriving from a direct economic interest in the environment

In the Consultation, the Government describes its proposals concerning the new categories of damage that operators of nuclear sites will be liable for under the revised Paris Convention; it proposes clarifying some aspects of these categories by the use of definitions that are absent from the original text of the revised Paris Convention. Government can do this as the Paris Convention permits the national competent national court to decide on how damage is defined.

The proposed clarification of the nuclear damage definitions will give both operators and the providers of operators' financial security greater certainty under the new, wider categories of damage, should recourse to legal action become necessary. However, although some clarity through definition has been achieved for the fourth 'environmental impairment' category of damage, Government has not sought to define more closely the fifth damage category - loss of income deriving from a direct economic interest in the environment.

In the Consultation, Government states that it considers that the scope of this new fifth category of damage is not wide (section 4.53) and uses two examples of possible damage to demonstrate the scope of the new category; in the document, Government also states that it does not intend to define 'direct economic interest' (section 4.56).

We believe that this lack of definition is a mistake and that Government should reconsider this position, as providing guidance to the competent court gives certainty to both operators & victims of a nuclear accident should damage occur. Without such a definition, we believe that the scope of this category of damage could be very wide and might raise an expectation of compensation where none should exist.

In the Consultation, two examples of how damage might arise under this category are given (section 4.52). In the second of these, the document outlines how a hotel could seek compensation because it is next to a public beach that has been closed owing to radioactive contamination. The choice of this example is unfortunate, as in our view it demonstrates that the scope of damage under this category could be very wide; if the hotel next to a beach can seek compensation, why shouldn't the hotel across the road also seek compensation? Why shouldn't the shops in the nearby town then also seek compensation? If contamination occurs in an urban area and an exclusion zone is established, possible claimants would be widened to those who might claim an 'economic loss' because they work or deliver goods to the zone, although they do not own property there. Such uncertainty could make the scope of this category very large.

With such a wide scope of damage possible under this category, operators are concerned that providers of financial security will not be able to quantify the potential damage and so provide the necessary cover. This will be to the detriment of both victims and the industry. The Paris Convention allows for the competent court to determine the extent of any category of damage; indeed Government has accepted that definitions are appropriate for other aspects of the new damage categories.

Therefore, for the sake of greater clarity for victims, operators and providers of financial security, we urge the Government to introduce a definition of 'direct economic interest', so giving the competent court guidance on the scope of this particular category of damage.

Costs of preventive measures

In relation to the introduction of a new duty to secure that no event arises that creates a grave and imminent threat of nuclear damage; it is maybe difficult, in practice, to distinguish such a duty from the other duties imposed in the revised section 7 of the Act. It may be easier to provide that compensation should be payable for preventive measures taken if there is a grave and imminent threat of a breach of duty, unless the creation of a new duty (however artificial it may be) is to create certainty and thereby to make it easier.

Whichever method is adopted for the introduction of this new head of damage there is still the issue of whether it is necessary to define a "grave and imminent threat". This phrase is used in other legislation, such as in sections 153(2) and 154(2) of the Merchant Shipping Act 1995 in relation to liability for oil pollution, without further definition. We have not been able to find any case law in which the court has considered the meaning of this precise phrase but the court is used to considering similar concepts – see, for example, the definition of "grave" as "serious or even very serious" in the case of *Poad v Scarborough Union* [1914] 3 KB 959 at 968. "Imminent threat" is defined in international law as "instant, overwhelming and leaving no choice of means and no moment for deliberation".

Certainty would greatly assist insuring these new heads of damage. There is great benefit in providing clarity to these general terms, which perhaps could be achieved by use of the above phrases and terms.

Paragraph 4.69 of the Consultation says that the types of consequential losses that can be claimed are to be limited to personal injury or property damage caused by the preventive measures. We believe that this is the wrong approach. It is very possible that there could also be significant impairment of the environment as a result of taking the preventive measures (which it is assumed will be less serious than any impairment of the environment which would have resulted had there been a breach of duty – a "lesser of the two evils" approach) and it seems right that a claim could be made in these circumstances.

We are concerned that preventive measures do not require the approval of the Secretary of State. It would be better, in our view, if there was consistency with the regime for measures of reinstatement. As we mention above there is clearly some scope for overlapping and inevitably, where possible, a claim will be made under this head as no approval is required. We accept that there may be an urgent need for preventive measures but the same could be said of measures of reinstatement. If there is an emergency procedure, as mentioned above, the same procedure could be used for applications under either head of damage.

General points

NIA welcomes and understands that the changes to the Act are not retrospective and that the new heads of damage will only apply in respect of nuclear occurrences which take place after the changes have passed into UK law and the Amending Protocol has been ratified.

In relation to section 11D(2) of the Act it may be necessary to consider whether a right of appeal is appropriate. Given that sometimes applications will be made on an urgent basis it may not always be practicable to spend time identifying which is the correct authority to take the measures. It could be that a consequence of leaving this provision as it is now drafted is that more decisions are likely to be the subject of judicial review.

Lastly, we feel that the new sub-sections of section 11 of the Act should actually be new sub-sections of section 12.

CHAPTER 5 GEOGRAPHICAL SCOPE

Questions for Chapter 5

Q - We would welcome views on our proposed implementation of the revised geographical scope of the Paris Convention and the Brussels Supplementary Convention as described in this chapter and as set out in the draft Order.

Particular questions you may wish to consider include:

(a) **Should we align our legislation with the Paris Convention by deleting current section 13 (2) of the 1965 Act. Would any important protections be lost (see paragraph 5.13)?**

(b) **How should we define who should be treated as a UK "national" for the purposes of section 16A (see paragraph 5.21)?**

RESPONSE

Geographical Scope

The response to the geographical scope questions have been broken down into three areas:

(a) the problems with the recognition and enforcement of foreign judgements;

(b) the joint protocol; and

(c) the questions posed by DECC.

The first two concerns are arguably outside the strict scope of the Consultation. They are nevertheless real concerns for the UK nuclear industry that could be addressed (at least partly) with the revisions to the Act.

Recognition and Enforcement of Foreign Judgements

Article 2 of the amended Paris Convention is set out in paragraph 5.4 of the Consultation. These changes are clearly an improvement but do not remove the possibility of a claimant in a non-convention country from making a tortious claim

against a Site Licence Company (SLC) or other third parties such as the negligent supplier in the non-convention country's courts.

The often cited example is the SLC or supplier causing a nuclear incident at one of the UK's nuclear installations which results in nuclear damage in Ireland. Ireland is a non-Convention country. The SLC or supplier could be sued in Ireland by the claimant in tort. The Act would not be applicable and would offer no protection. This example outlines the potential trans-boundary implications that could expose the SLC or supplier to liability that is outside the Act. On the basis that the SLC or supplier does not have any assets in the particular country, the important consideration with actions brought in that country is whether judgements can be recognised and enforced in the UK. The position varies depending on whether the country, which has awarded damages and seeking the award to be enforced in the UK, is a Paris Convention country or a non-Paris Convention country.

One of the principles of the Paris Convention is that jurisdiction over actions lies exclusively with the courts of the Convention country where the nuclear incident occurred. It is therefore unlikely that a judgement in another Paris Convention country would need to be enforced in the UK.

In relation to judgements made in non-Paris Convention countries, the amended section 17(5) sets out a defence to any actions made in the UK that attempt to enforce judgements made in a non-Paris Convention countries. The defence would prevent any judgements given in respect of nuclear damage in the courts of a non-Paris Convention country from being enforced in the UK. This is based on amended section 17(5) which applies (1) to awards in "respect of injury, damage or impairment of the environment or a grave and imminent threat of injury, damage or impairment of the environment of a description" and (2) where the original judgement was made in a non Paris Convention country. Importantly, the SLC or a supplier may be liable under the laws of the non Paris Convention country if the claimant can show that the SLC or supplier caused or contributed to a nuclear incident (e.g. through its negligence). This is clearly contrary to the principle of "channelling" and section 17(5) is intended to bar enforcement of judgements in such cases.

NIA welcomes this. However, the defence in section 17(5) is subject to section 17(5)A which sets out that the defence cannot be used where the judgement in question is

enforceable in the UK in pursuance of an international agreement. The term "international agreement" is not restricted to international Conventions in the field of nuclear energy. As a result, there will not be much difficulty for a judgement to be enforced in the UK when the non-Convention country is a contracting party to any of the Conventions for the enforcement of foreign judgements (the "Enforcement Treaties").[1] Accordingly, in the event that nuclear damage is incurred in a non-Convention country, where that country falls under the auspices of one of the Enforcement Treaties, a claimant would be able to bring an action in that country; the courts of that country are likely to apply their own laws; and in the event that the claimant succeeds, the UK courts would have to recognise and enforce the judgement. Non Convention countries that are parties to some of the Enforcement Treaties include Ireland, Luxembourg and Austria.

One of the key principles in the Paris Convention is to channel liability to the SLC and compensation should not be recoverable from any third parties (e.g. a negligent supplier). The Act does not protect SLCs or third parties from being exposed to nuclear liability to claimants in non-Paris countries. One approach to solve this problem maybe to modify the terms of the Act so the SLC remains responsible for such liability in the event of a successful claim against a third party when such claim is made in a non-Paris Convention country. This could be implemented by way of an extension to the rights to compensation in section 12 of the amended Act. This would also need to be reflected in the proposed wording against section 13 of the Act.

The Joint Protocol

There is a reference to the Joint Protocol in paragraph 5.4 of the Consultation. It is suggested that the UK becomes a contracting party to the Joint Protocol. [2] This is clearly a step towards creating one common regime by extending the territorial scope of the two conventions and it prevents claimants in the Convention countries from raising tortious claims. The UK not being a contracting party presents two key concerns for the UK's nuclear industry:

[1] A foreign judgement may be enforced in the UK if the country falls under (a) the European Enforcement Order Regulation; (b) the Brussels Regulation; (c) the 1988 or 2007 Lugano Convention; (d) judgements of commonwealth states; and/or (e) countries with which the UK has a bilateral treaty.

[2] The other bridging convention is the Convention on Supplementary Compensation ("CSC"). However, this is not yet in force and has been criticised because of the so called "grandfather" clause. The grandfather clause allows the US to maintain its nuclear liability legislation unmodified which is a concern because the national law in the US is not consistent with the position in the Vienna and Paris Conventions.

(a) ***SLC*** - in the event of a nuclear incident in the UK which has trans-boundary consequences resulting in injury/damage to victims in a country that is a contracting party to the Vienna Convention and Joint Protocol, the SLC in the UK may be exposed to claims from victims in that country. In this situation liability would not be determined in accordance with the Paris Convention principles.

(b) ***UK supplier*** - one of the problems for a UK supplier operating in Vienna Convention countries is that the UK would be viewed as a non-Convention country in the event of a nuclear incident in such Vienna country. As a result, if the UK supplier is working for an operator in a Vienna Convention country, and negligently causes or contributes to a nuclear incident, the claimant may be able to bring an action or enforce a foreign judgement against the supplier in the English court.[3] The UK supplier would not have the protection under the international regime. The supplier is unlikely to have insurance to cover this liability and could be exposed to an unacceptable risk. This gap has resulted in lengthy negotiations and problems for UK suppliers and is something that could be easily resolved with the UK ratifying the Joint Protocol.

The reasons for the UK not ratifying the Joint Protocol may be due to the UK's island status with all its closest neighbours being Paris Convention signatories (although, the scale of the trans-boundary contamination following Chernobyl undermines this view). However, the principal reason is likely to be the lack of reciprocity between the operator's limits of liability required under Paris/Brussels and the Vienna Convention. Victims suffering damage/injury from an installation situated in a Paris Convention country have more available compensation than those who suffer damage from operators in Vienna Convention countries. There is no adequate balance between a high compensation territory and a low compensation territory. If this is the real reason for the UK not being a signatory, one solution is to introduce the concept of reciprocity into the [the *Act and*] the Joint Protocol. This has been argued as being entirely in line with the international treaties where the general rule is that one can only require what one is

[3]For example this could be caused by negligence in manufacture in the UK where the defective equipment is delivered to an operator in another country or when architect or owner engineer services are performed in another country.

prepared to give.[4] This exchange of reciprocal benefits would only apply in relation to the compensation amounts. If, for example, the victim, in a Vienna country suffered damage from an installation situated in a Paris country, that victim would only be entitled to recover such sum as is recoverable under the regime in the Vienna country.

DECC Questions

In terms of DECC's two specific questions our responses are as follows:

Should we align our legislation with the Paris Convention by deleting current section 13(2) of the 1965 Act? Would any important protections be lost (see paragraph 5.13)?

We do not see the merit of deleting section 13(2) which is long-established, and which would avoid the difficulties referred to in the main part of this note at least where the claimant is on board a UK-registered ship.

How should we define who should be treated as a UK "national" for the purposes of section 16A (see paragraph 5.21)?

In order to cover the various classes of British nationals, the following wording has been used when drafting legislation (for example, see section 109(4) of the Anti-Terrorism, Crime and Security Act 2001):

> *"A national of the United Kingdom is an individual who is:*
>
> (a) a British citizen, a British Overseas Territories citizen, a British National (Overseas) or a British Overseas citizen; or
>
> (b) *a person who under the British Nationality Act 1981 is a British subject; or*
>
> (c) *a British protected person (within the meaning of that Act)."*

[4] See the article by Norbert Pelzer, (1999) *Focus on the Future of Nuclear Liability Law*, Reform of Civil Nuclear Liability, International Symposium Budapest, p. 440.

CHAPTER 6 LIMITATION PERIODS

Questions for Chapter 6

We would welcome views on our proposed implementation of the revised provisions on limitation periods in the Paris Convention as described in this chapter and as set out in the draft Order.

A particular question that you may wish to consider is whether we should apply the 30 year limitation period to claims in respect of injury caused by preventive measures (see paragraph 6.6).

RESPONSE

Contractors have been able in the past to purchase Risk Transfer insurance cover for the requirements of the Act other than for 'allowable releases' for the 10 year prescription period.

The 30 year period will not be available from the Risk Transfer market and leaves UK Site Licence holders at a disadvantage in comparison to other EU countries where Governments have implemented the changes but accepted that where financial security is not available an indemnity is to be provided.

Worldwide, the majority of Insurers (Risk Transfer) will not provide 30 year cover and it can mainly only be provided by Mutual Insurers operated by Utilities which do not have enough capacity to provide the full limits required.

In the event of a major loss, compensation claims will probably consume the revised limit within the existing 10 year period, so that claims outside this period would in any case revert to the Government.

Over the last 50 years it is believed that there have been no claims made over the current 10 year prescription period and this situation is unlikely to change with the current revisions. We suggest that when the Convention is ratified and legislation updated the current arrangement continues where any liability over 10 years is covered by the Government either as a reinsurance or by an indemnity.

Preventative measures should not incur new liabilities after the 10 year period since if there is no release any injuries should be immediately notifiable, and if a release ensues then the same priority of payment comments apply in that any claims will be immediate and the insurance compensation used up before the 10 year period is completed. Mutual Insurers may be prepared to cover the 30 year period, but this is inevitable, as it becomes a requirement of their members whose responsibility it becomes if the change suggested is made without Government support. In the event of a loss any risk retention entity would be unlikely to have enough capacity or sufficient solvency to cover the whole limit requirement.

Alternative forms of financial security, if available, may not be financially acceptable to operators without UK Government backed finance.

Insurers are not prepared to provide cover which cannot be easily separated from the effects of 'societal' cancers, as this will only result in lengthy litigation which involves victims in further uncertainty. The Convention's intentions are to provide compensation on a no fault basis in the event of a release as a result of that release; the further from the ‘event’ such injuries become apparent the more difficult it becomes to unequivocally accept that the event caused those problems.

CHAPTER 7 LIABILITY DURING TRANSPORT:

Questions for Chapter 7

Q - We would welcome views on our proposed implementation of the change to the Paris Convention regarding liability for transport of nuclear substances and the other related matters as discussed in this chapter and set out in the draft Order.

In particular, we would welcome views on the options set out in paragraphs 7.11 and 7.12. Is it common for nuclear substances to transit a licensed site while *en route* from one nuclear installation to another?

RESPONSE

The all-embracing approach taken in the Act and stated in para. 7.9 of the Consultation appears to be inconsistent with Article 5.2 of the 1960 Paris Convention which provides that the liability for an incident occurring in a nuclear installation and involving only materials incidentally stored there during transport generally rests with the liable sending or receiving operator and not the operator of the nuclear installation storing the materials.

Article 5.2 of the Paris Convention is the same as Article 5.b of the Paris Convention; the matter of a "direct economic interest" would appear to be irrelevant unlike the suggestion in para. 7.11 and 7.12.

Accordingly, it is unclear whether there are the two options as stated in the Questions for the Chapter of the Consultation. (i.e. as set out in para. 7.11 and 7.12) since it is arguable that there is no alternative as stated in para. 7.12 with respect to incidental storage of materials as suggested.

As for the transit of materials during transport across another nuclear installation (i.e. for the UK purposes being a licensed site) the Consultation appears to merge it with the matter of incidental storage of materials during transport as stated above.

Note that Article 5.c. of the Paris Convention is relevant for determining liability for a nuclear incident occurring outside a nuclear installation during the transport of material, in those cases where the material has been in one or more nuclear installation.

In para. 7.5 of the Consultation, the driver for the "direct economic interest" provision in the Paris Convention is the need to avoid the use of potentially lower OP limits than in other Paris Convention Parties. In this context, is the intention to introduce the "direct economic interest" provision in the context of intra-UK transports between UK licence site holders, including incidental storage of materials and transit? If yes, are we sure that this was the intent of the 2004 Paris Convention?

Finally, in terms of the drafting the proposed section 7(A) may need to be made a little clearer.

CHAPTER 8 FINANCIAL LIABILITY LEVELS:

Questions for Chapter 8

Q - We would welcome views on our proposed implementation of the revised financial liability levels as described in the chapter and set out in the draft Order.

In particular, we would welcome views on:

(a) **The likely impact of increasing the standard liability level to €1200 million as compared to €700 million;**

(b) **The proposal to set a reduced level specifically for low-risk transport and to use the criteria in the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009. Is this a practical solution? Would it add significant administrative burdens? Are there alternative criteria that could be used to indentify low-risk transport?**

RESPONSE

Our understanding is that insurance is likely to be available to cover the €1,200m limit if required.

In terms of the likely impact this is essentially a matter for the existing and new nuclear build operators. It is clear however that, since they will need to provide additional cover, the proposed change would increase their costs. It may also lead to an increase in liability greater than in some other European countries.

In relation to 'low risk sites' it is important that the new arrangements recognise the low hazards involved, and we therefore welcome the Government's intention to continue to exercise the reduced liability option. Nonetheless the increase in the liability limit to €70m is a major jump from the current £10m, and will lead to significant increases in insurance costs.

In this context we believe the Government should consider extending the ambit of the "low risk sites" group to those sites which no longer have nuclear fuel on them and where the insured sum of £70 million should be more than sufficient to cover any claims arising.

CHAPTER 9 – AVAILABILITY OF INSURANCE/FINANCIAL SECURITY:

Questions for Chapter 9

Q - We would welcome views on the availability of insurance or other financial security.

In particular, we would welcome views on:

(a) **What forms of alternative financial security should be acceptable and over what classes of liability might alternative forms of financial security be appropriate?**

(b) **How Government should assess operators' proposals for alternative financial security arrangements?**

In addition, we would welcome views on the Government stepping in as a last resort to fill any insurance gap. How should Government calculate the charge for this?

RESPONSE

Our view is that some of the potential liabilities that the Government is proposing to impose on operators will be uninsurable in the current market. These include:

(i) liabilities arising from "normal operations". If the radiation levels from a nuclear site are within the limits set by the Government we are not sure how a nuclear operator could be liable for damage. Insurance is designed to cover fortuitous events and if radiation levels are within the limits set then the exposure is to be expected and would not be fortuitous.

(ii) liability for bodily injury claims in the period from 10 years after an incident to 30 years. Issues include lack of appetite for long-tail claims and risk of a significant volume of claims following a nuclear incident not related to the incident.

We believe that the most practical way to deal with the uninsurable liabilities is to protect the operators by risk transfer to the Government as suggested in section 9.23 of the Consultation. Our view is that the charge for this risk transfer should be established on an actuarial basis – similar to the capacity available in the market – rather than at a premium.

Alternative Financial Security

We have no objection to allowing operators to offer alternative financial security instead of insuring their risks, although we feel there may be a risk currently that it could be an uneconomic route given the high cost of bank guarantees and other instruments that would be likely to be acceptable to the Government, and the considerable length of time that such an instrument would need to be available for to cover potential claims. That said it is possible that the insurance market at the time new reactors are built may look different, and it would make sense therefore for Government to adopt as much flexibility as possible in deciding what insurance or other financial security is required.

Looking at the current market our view is that surety bonds are unlikely to work for many UK companies as these would amount to structural subordination as the surety would effectively be given first recourse to the local assets of the operator and as such would breach any investors banking covenants (including no negative pledge and pari passu) and would require waivers from bond holders which are expensive and time consuming to get. Shareholders in consortia will find it very difficult to incur long term contingent liabilities (for 30 years) in the form of the indemnities and hold harmless undertakings that banks and sureties will require, before they issue a surety bond to any operator.

Parent Company Guarantees may not be practical as paper issued by an investment grade ultimate parent may be subject to credit stress (and possible rating downgrades) in the event of a nuclear incident (as has been the case with TEPCO following recent events in Japan).

The use of captive insurance vehicles by operators to provide risk transfer solutions looks increasingly doubtful in the light of increasing solvency requirements, especially following recent events in Japan.

Bank guarantees are problematic as they are expensive and will likely have a detrimental effect financial ratios of operators and their parents.

If an operator were to offer alternative financial security then their proposal should set out detailed plans covering a range of topics such as: how the financial security would be made available if needed, how the claims handling would be conducted; how decisions would be made on which claims to pay and which to reject and appeal procedures for claims that are rejected.

We agree with the view expressed in 9.17 of the Consultation document that risks that could give rise to large scale incidents are better covered by insurance.

CHAPTER 10 – JURISDICTION:

Questions for Chapter 10

Q - We would welcome views on our proposed implementation of the Paris Convention changes regarding allocation of jurisdiction, both between Paris countries and within a Paris country, as described in this chapter and set out in the draft Order.

In particular, we would appreciate views on:

(a) **Whether basing our tie-breaker provisions on the impact of an occurrence, event of breach of duty would be a workable solution - how practicable would it be to measure impact (see paragraph 10.16)?**

(b) **Whether we need a fall back provision giving jurisdiction to the High Court of Justice (see paragraph 10.17).**

In addition we would welcome views on our proposed clarification of "occurrence" in new section 26 (2A) of the 1965 Act.

RESPONSE

The NIA believes that a clear benefit of a nuclear liability regime should be its simplicity to victims to make claims. NIA is concerned that in the event of a transport

incident leading to an occurrence that the rules here are not sufficiently simple or clear for victims. As liability will in the majority of cases lie with the operator that consigned material we would suggest that the appropriate court should be the court where the liable operator is based.

NIA welcomes the clarification of the term occurrence which had the potential otherwise to involve operators in duplicitous claims for the same incident. It is important to establish that retrospectively is linked to this new definition in the terms of the final order.

CHAPTER 11 – NUCLEAR WASTE DISPOSAL FACILITIES:

Questions for Chapter 11

Q - We would welcome views on our proposals for implementing the Paris Convention requirements in respect of nuclear waste disposal facilities.

In particular, we would welcome views on the number of commercial waste disposal facilities who may be affected by the proposed changes and how they may be affected.

RESPONSE

In considering points about waste and liability it is important to confirm the definition of the matter at issue. For example immediate thoughts go to the by products of the civil nuclear power generating industry, but this does not cover the entirety of the waste. Some radioactive material is deliberately excluded from the strict liability regime, as it is thought not to pose a significant danger. So it is useful to see what these exclusions extend to, before setting out the regime.

It would be logical in some ways for the exclusions to cover all low activity materials including wastes on a purely risk based approach, but to date that has not been adopted. The Consultation suggests that remodelling the Act will allow a more risk based approach. However that approach could call for the decoupling of the regimes for licensing and liability in respect of waste facilities. It is difficult to see how this could

be regulated in a way which provides full public confidence without the introduction of new primary legislation to cover such facilities.

In the international context in addition to the Paris Treaty the UK is a signatory to the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management 1997 (Joint Convention). This international agreement under the auspices of the IAEA introduces concepts which may in due course be reinforced by prospective legislation from the European Union "Proposal for a Council Directive (Euratom) on the management of spent fuel and radioactive waste". The UK should therefore act in a way consistent with its undertakings in respect of the Joint Convention and representations regarding the Proposed Directive.

The legislation at issue

International; Convention on Third Party Liability in the Field of Nuclear Energy of 29th July 1960, (the Paris Convention). NB this is supplemented by the Brussels Convention (recognising the Vienna Convention by the Joint Protocol where applicable) and references to Paris reflect the Brussels element.

The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management 1997.

Domestic Primary; The Nuclear Installations Act 1965

Domestic Secondary. The Nuclear Installations (Excepted Matter) Regulations 1978 (SI 1978 No. 1779).

The Nuclear Installations Act 1965 (Act)

The Act deals with the treatment of "Nuclear matter" "Excepted matter" is defined at section 26(1)

> "...nuclear matter consisting only of one or more of the following, that is to say –
>
> (i) isotopes prepared for use for industrial, commercial, agricultural, medical, scientific or educational purposes [the reference to educational purposes was added by section 32 of the Energy Act 1983];

(ii) natural uranium;

(iii) any uranium of which isotope 235 forms not more than 0.72 per cent;

(iv) nuclear matter of such other description, if any, in such circumstances as may be prescribed (or, for the purposes of the application of this Act to a relevant foreign operator, as may be excluded from the operation of the relevant international agreement by the relevant foreign law)."

(This definition is expanded by the 1978 regulations, see below.)

In the Act duties around liability and insurance are only imposed in respect of nuclear matter (i.e. not excluded matter) the duty of the nuclear site licensee under the Act is to secure that no occurrence involving nuclear matter causes relevant injury or damage. These occurrences extend to areas outside the nuclear site which involve nuclear matter, other than excepted matter, which is in the course of carriage on behalf of the licensee or to that site with the agreement of the licensee from a place outside the relevant territories (section 7(2) (b)) or which has been on the licensed site (section 7(2) (c)).

The insurance position is that specific nuclear liability insurance is provided in relation to nuclear matter, and other types of general or third party liability insurance do not cover nuclear matter. The Operator must be sure which type of matter is at issue to arrange adequate insurance.

The Nuclear Installations (Excepted Matter) Regulations 1978 (SI 1978 No. 1779).

The 1978 regulations at reg. 3 state:

"For the purposes of paragraph (d) of the definition of "excepted matter" in section 26(1) of the Act it is hereby prescribed that the following shall be excepted matter –

any substance consisting substantially of uranium in which –

(v) the total activity content per gramme of that substance of all radioisotopes other than any uranium isotopes which are normally

present in natural uranium or any daughter products of such uranium isotopes –

(A) does not exceed 200,000 alpha disintegrations per minute for all alpha emitting isotopes; and

(B) does not exceed 20 microcuries from all beta or gamma emitting isotopes; and

(vi) the mass of the isotope uranium 235 does not exceed 1 per cent of the total mass of all the uranium isotopes present.

for such time as it is outside a relevant site, nuclear matter (other than waste discharged on or from a relevant site or consigned therefrom) which has been consigned from a relevant site and which at the time when it left that site –

(i) was duly packed and labelled in accordance with the appropriate provisions of IAEA Regulations, and

(ii) did not exceed the limits of activity prescribed in regulation 4 hereof, and

(iii) being fissile material, did not exceed the limits prescribed in regulation 5 hereof, and was either

(A) exempted by paragraph 601 of the IAEA Regulations, or by section C5.1.2 of the 1967 Edition of those Regulations, from the additional provisions of those Regulations relating to packages containing fissile materials, or

(B) packed in such a way as to satisfy the nuclear safety criteria laid down for Fissile Class I or Fissile Class II packages in either the IAEA Regulations or the 1967 Edition of those Regulations."

Regulations provide further details of lowest applicable activity levels but the words in reg. 3(2) – "other than waste discharged on or from a relevant site or consigned therefrom" remove this exclusion for material designated as waste.

The words "other than waste" require further examination. In doing that the context of the drafting may be helpful. Parliamentary statements at the time indicate that that the Act was intended to be consistent with both Paris and Vienna Conventions on Liability. The UK is a signatory to the Paris Convention which is now the subject of the 2004 Protocol, the catalyst for the proposed changes to the Act.

The Paris Convention deals with the liability of the operator for damage caused by a nuclear incident involving nuclear substances. "Nuclear substances" is defined at Article 1a (v) to mean nuclear fuel (defined as fissionable material) and "radioactive products or waste" (defined at Article 1a (iv) to mean any radioactive material produced in or made radioactive by exposure to the radiation incidental to the process of producing or utilizing nuclear fuel, but not including nuclear fuel or manufactured radioisotopes usable for industrial, commercial, agricultural, medical, scientific or educational purposes).

The operator's liability extends to radioactive waste, although not all material which might be regarded as radioactive waste for the purposes of the Radioactive Substances Act 1993 will be radioactive waste for this purpose, which depends upon the material having been irradiated by radiation incidental to the production or utilization of nuclear fuel.

Hence the Act imposes liability for occurrences involving nuclear matter "Nuclear matter" is defined as that which is either (a) any fissile material, or (b) any radioactive material produced in, or made radioactive by exposure to the radiation incidental to, the process of producing or utilising such fissile material. This excludes excepted matter, i.e. (a) isotopes produced for industrial and other specified purposes; (b) natural uranium; (c) any uranium of which isotope 235 forms not more than 0.72 per cent.

However examining the history of this legislation shows that the exclusion of waste from fission, even at very low activity levels was a consistent decision, possibly on policy grounds to prevent accumulation of such waste by unlicensed operators.

The Paris Convention and the Joint Convention

The Paris Convention is the international agreement framing UK policy on Nuclear Liability and the main driver for the changes envisaged in this Consultation. The Joint Convention applies to spent fuel and radioactive waste resulting from civilian nuclear

reactors and applications and to spent fuel. Also radioactive waste from military or defence programmes if and when such materials are transferred permanently to and managed within exclusively civilian programmes, or when declared as spent fuel or radioactive waste for the purpose of the Convention by the Contracting Party.

The obligations of the Contracting Parties with respect to the safety of spent fuel and radioactive waste management include, in particular, the obligation to establish and maintain a legislative and regulatory framework to govern the safety of spent fuel and radioactive waste management and the obligation to ensure that individuals, society and the environment are adequately protected against radiological and other hazards. Hence the proposed changes must be aligned with the requirements of the Joint Convention.

Conclusion

On interpreting the wording of the Conventions conservatively it would appear that specific action would have to be taken to obtain authority from the Convention to allow low activity waste to be excluded from the nuclear liability regime, where that waste arises from the fuel cycle. Waste from other sources, such as medical isotopes may automatically be excluded. The Government has considered operating an implied exclusion on the basis of de-minimis to allow this path to be taken without reference to the Convention but rejected this for reasons of public policy. The caveat being that obtaining the formal exclusion (the chosen method of proceeding) will take some time.

In practical terms until such an exclusion is agreed under the terms of the Paris convention and implemented in UK law the operators of nuclear power plants can transfer waste (subject to acceptable activity levels) to unlicensed facilities for storage but will retain liability for any nuclear incident in relation to that material.

Whilst the Operators may find ways of covering this contingency in the interim they will have (albeit a low risk) of liability for material which is no longer under their control if it is transferred to an unlicensed commercial waste management operation. This raises three immediate issues;

(a) the need to check the insurance and indemnity aspects to ensure a viable position both for the nuclear operators and the operators of any such commercial site;

(b) the risk that imposing a liability on commercial waste operations without the application of the licensing regime may lead to a lack of public and investor confidence in such schemes particularly given the long time scales involved in managing radioactive waste;

(c) whether the proposed arrangements meet the specific requirements of the Joint Convention, in particular Article 19?

If the Government does wish to permit radioactive waste facilities to deal with specified low activity level material without the full rigour of the licensing system, regulation must be established in respect of liability which will achieve public confidence and compliance with international norms. This may therefore call for fresh primary legislation.

CHAPTER 12 – REPRESENTATIVE ACTIONS:

Questions for Chapter 12

Q - We would welcome views on our proposals for implementing the new Paris Convention requirements in respect of representative actions.

RESPONSE

Based on the literature available on various forms of group litigation and their operation in jurisdictions within the EU and the USA, it would seem that most forms of group litigation run the risk of:

(i) procedural issues; and/or

(ii) confusion/lack of knowledge on how the litigation proceeds; and/or

(iii) exposure to claims that are without merit or which amount to an abuse of process.

In the light of this and of the industry's acceptance of the need for a regime which holds operators to account for nuclear incidents the NIA would suggest Government consider the following recommendations:

Ensure appropriate gatekeeping mechanisms are put in place to prevent unmeritorious claims being brought – mechanisms used in other regimes include narrowly defining an 'interest' so as to limit the number of persons who can join the group of persons represented, as well as requiring any persons so represented to make some financial contribution to the litigation conducted. Against the backdrop of strict and exclusive liability, it may be considered inappropriate for the Government to require financial contributions from Claimants in advance under the 2004 Protocol. However there could be a financial risk put in place to deter those States tempted to bring claims which ultimately fail (see paragraph 3.2 below). Both restriction mechanisms, if employed properly, could:-

(a) prevent unmeritorious claims being included in a pool of genuine claims;

(b) reduce the financial and administrative burden placed on the State bringing such an action; and

(c) reduce the financial and administrative burden placed on the UK court in which such actions are brought.

Ensure the 'loser' pays principle remains a possibility – in a situation where it transpires that loss is not attributable to the nuclear incident in question. The Government should allow the Courts the ability to make a costs order against the loser i.e. the State which has failed to establish a claim pays both parties' costs. The Government should also consider allowing the Courts to make a costs order against members of the class whose claims fail. This could potentially deter unmeritorious claims, as well as make States more selective/restrictive/appropriately discriminatory in the actions they choose to bring on behalf of others. It would need to be made clear to Claimants that the Government could seek to recover its outlay (legal costs or administration charges for example) from them in the event of a failed claim.

Operate an opt-in regime, opposed to an opt-out regime – the opt-out regime in the USA has been criticized for being disproportionately skewed against defendant companies who essentially become 'sitting ducks' to claims by persons who may not actually wish to bring a claim but simply fail to opt-out of litigation because they have failed to receive relevant notices, failed to properly read relevant notices, or simply not understood them. An opt-in regime would go some way to ensure that States only bring

actions on behalf of persons who not only have genuine claims, but who actually wish to seek redress for any damage suffered as a result of a nuclear incident through the courts.

Employ a Claim Ombudsman/Court Representative – a Claim Ombudsman could be used by the Court (as is in Swedish Courts) to appropriately restrict which group of persons a State can bring representative actions on behalf of. This would act as a further filter to ensure that unmeritorious claims do not waste Court time or unfairly burden defendant companies. The use of a Claim Ombudsman could also assist the Court's management of any cases brought. A court-appointed representative, employed to advise States on the way in which representative actions operate under legislation enforcing the 2004 Protocol, could equally assist in the management of any representative actions brought.

Include provisions which allow the Court to exercise its discretion not to allow certain representative actions to progress – this could again act as an important filter to any unmeritorious representative actions being brought by a State on behalf of other persons.

Provide appropriate literature to any State wishing to bring a representative action on behalf of other persons – this will be especially important where a State has little/limited knowledge of the Court system in the UK.

Include provisions to the effect that an individual cannot bring a further claim should a State be unsuccessful in bringing a representative action on theirs and other persons' behalf – this would be an especially important safeguard to ensuring greater certainty and finality to the operation of representative actions as a whole.

Nuclear Industry Association

28 April 2011

To Roh Hathlia, Assistant Director, Nuclear Policy Unit, DECC

Dear

Re Implementation of Changes to the Paris and Brussels Conventions on Nuclear Third Party Liability — Working Papers — DECC August 2010 ('Working Papers')

I am writing to you on behalf of the Nuclear Industry Association (NIA) which is grateful for the early opportunity to comment on how the Government's thinking is developing with regard to its planned approach to the implementation of changes to the Paris Convention.

Introduction

This response, prepared by the recently constituted NIA Nuclear Liabilities Working Group, seeks to address high level issues, and it may appear that more questions are asked than guidance given. We hope to be in a better position to comment more fully and meaningfully once more of the detail is developed and known after the forthcoming public consultation.

What is clear is the need to bring a degree of certainty to the intended regime changes for the benefit of operators, potential claimants, and the wider nuclear sector whether involved in decommissioning or new build. In terms of the proposed broadened scope of liability under the amended Convention, careful thought will need to be given to the legislative drafting to ensure consistency with the current civil liability and regulatory regimes dealing with environmental damage and reinstatement. Equally how operators will discharge their financial obligations to maintain insurance and other financial security to cover their increased liabilities under the Convention and maintain sufficient liquidity to meet any claims for compensation also needs fundamental questions addressed. Here certainty is of particular importance, as defending claims whether with merit or driven by principle is costly, both in financial and reputational terms.

Methodology

The Working Papers were circulated to the Nuclear Liabilities Working Group for comment. Responses were collated and the broad themes taken from those responses are set out in this letter. It was generally felt that a detailed response at this stage, with the limited time available to consider the issues, was not appropriate, and that a fuller response would be developed by the Working Group once the implementation proposals have developed and taken shape pre and post the public consultation. During this time the Working Group will canvas and represent the views of the wider industry through the NIA membership.

The general feeling however was that the Working Paper looked well considered and clear, and even if in some areas it lacked important detail it provided a platform to build on. It is assumed the new legislation will come into force only when the Treaty does so and not before?

The remainder of this letter will address Paper 1 - *The New Categories of Damages*, and then Paper 2 — *Financial Security* in turn.

Paper 1: The New Categories of Damages

As an overarching comment, the Working Group believes it is important that the new heads of damage should not apply to events *known* prior to the date of the amended regime coming into effect, i.e. should be non retrospective. Two potential scenarios by way of example may be borne in mind when considering Paper 1. Firstly, the potential for further litigation emanating from Ireland for historic discharges, for example from Sellafield into the Irish Sea, and secondly the issue of 'particles' found on the beaches and sea bed probably from historic discharges around Dounreay.

It would not be appropriate to impose new heads of damage for historic discharges and if this is not made clear in the changes then the new legislation could inadvertently permit claims for releases prior to the Treaty coming into force.

A second overarching comment relates (para 24) to the adoption of the Convention wording without further elaboration and could imply that 'cutting and pasting' aspects of the Convention into domestic legislation would fit seamlessly. This may not however be the case, and the relationship for example with the Radioactive Contaminated Land Regime would need careful consideration, as would the scope of the new heads. Whether interpretation would be aided by supporting guidance and scope clarified by

the introduction for example of new environmental regulation remains to be seen. If as seems the case it is the intention for the new laws and the Radioactive Contaminated Land Regime to both remain in tandem then their interaction will need to be carefully reviewed to ensure there is no room for confusion or conflict. Both regimes provide mechanisms for identifying persons to be liable for clean up but the Radioactive Contaminated Land Regime does not involve channelling of liability in the same way and this could lead to difficulties unless thoroughly thought through.

Para 35 raises an interesting question on the prioritisation of settling claims once an operator's liability limit is exceeded. The Working Group is keen to see how this line of thinking is developed and whether for example guidance is taken from disaster recovery scenarios and regimes from the global nuclear sector and analogous and similarly risk-profiled industries, for example rail and oil. However, this does raise a number of questions in relation to how the operator or Government should prioritise claims and which should be paid first. What if the damage /injury does not manifest itself for many years — does this put a hold on all other compensation payments? Would this result in victims not being compensated for certain losses because they fall into the wrong category? Does it mean there will be lot of sub-limits under the overall limit on liability?

Para 51 makes the point that in certain circumstances, for example *radioactive contamination of land,* the risk of double recovery for claimants increases — a claim for property damage and a claim for costs of reinstatement. The claim for the former could be low but the latter very high, although para 58 notes that 'reinstating' and 'restoring' are not defined within the Convention As an aside, it might be worth considering at this point the issue of potentially standardising key terminology, and whether formal definitions for certain key terms should be adopted. An example would be whether for example to adopt the same approach and define say *environment* in line with other UK definitions in the Environmental Protection Act 1990.

At para 21 there is a concern that the use of the words 'the costs of' in categories 4 and 6 are inappropriate. It is the head of damage that is being described rather than the method of assessment such that, in the style of the other categories listed, these words should be removed so that the heads are described as "measures of reinstatement of .... (4) and 'preventative measures, and ...'

It is noted that in category 3 economic loss is expressed to be available only to a claimant who has suffered injury or damage to property under paragraphs 1 and/or 2. This would have the effect of excluding a claimant who experiences economic loss only as a result of a nuclear incident (not linked to injury or property damage suffered) e.g. the inability to access a place of business in an affected area.

Categories 5 and 6 however, extend the remit for economic loss referring to 'loss of income deriving from a direct economic interest in any use or enjoyment of the environment' and we wonder if the word 'direct' is possibly being confused with the concept of 'proximity'. At para 73 the example cites the fisherman who could be recompensed under this head of damage for economic loss as a result of contaminated fish which are not his property. What is the position of the supplier to the fisherman who suffers loss of business as a result of the fisherman's loss?

The words 'in any use or enjoyment of the environment' are very broad and may have the effect of widening the rules of pure economic loss. There is scope for significant argument in relation to category 6 that a wide range of claims could be pursued on the basis of the wording 'and further loss or damage.

There is also a reference in Table 1 that alludes to the UK ratifying the Joint Protocol. Although this will not have a direct impact on the implementation of these changes, would you confirm when is this likely to occur and the reasons for the UK not ratifying the Joint Protocol?

Paper 2: Financial Security

By way of overarching comment, operators will need to be able to comply with any financial security levels imposed. With the increase in required financial cover set to rise from the current £140m to E700m, along with the increased scope of liability, increased geographical boundaries of liability and an increased term of exposure to potential claims, the means of providing operators with the financial security needs to be settled. Leaving the solution to a niche, albeit highly specialised and reputable sector of the primary insurance market, may not be the ideal. Insurance premia could fluctuate for reasons outside the control of the operators, due to factors in other insurance markets, and operators will have little opportunity to approach alternative providers to test value, pricing and terms, which may impact competitiveness with operators in

overseas markets. Greater clarity is needed on how this aspect of the new regime will operate It may well be for example that the Government as insurer of last resort could stabilise and balance the market more in favour of the operators. In any event the issues of long-tail liabilities (10-30 years) and measures of reinstatement for impaired environment outside the UK need to be considered maybe on a pan Convention signatory basis.

One further point particularly relevant to long tail liabilities relates to the currency the Convention financial limits are set out in. Does it provide optimum certainty for the legislation to refer to Euros rather than sterling for the UK? Exchange rate risk could to some extent be managed by quoting in sterling with later amendment by Order or Direction.

There is reference to 'other financial security', where insurance cannot cover the liability and other financial security should be found by the site licensee and where such security cannot be found then Government would the insurer of last resort. However in the area of decommissioning for NDA sites, the NDA provides the insurance for all its sites and where no insurance is available from Nuclear Risk Insurers Limited ('NRIU) the NDA provides that financial security. The NDA is Treasury-funded and requires Treasury approval to provide financial security. Will the Treasury be providing that financial security to the NDA by providing an indemnity to the NDA?

A further comment relates to cover only for confirmed sudden and accidental release of radiation (para 101). This raises the question of gradually occurring occurrences and even those discharges made within permitted levels.

It has also been noted out that the Working Paper refers quite extensively and exclusively to NEIL, for example at paras 100, 101, 102, 104, 108. At para 100 it is stated that site licensees purchase commercial insurance through the UK 'Nuclear Pool' operated by NAIL, and the references to NEIL clearly imply that NEIL speaks on behalf of the insurance market, or *is* the UK nuclear insurance market.

Whilst the importance of NEIL should not be underestimated it should be noted that NAIL do not speak on behalf of the whole market, and that there are other insurers operating in the nuclear sector in competition with them. These include for example EMANI, which has a substantial portfolio of nuclear property and business interruption

risks in the UK and Europe, and MINI and NEIL which are keen to underwrite liability risks in the UK (subject to necessary regulatory approval).

Given the increasing liabilities on nuclear operators with the implementation of the amended Conventions it is important not to underestimate the potential benefit of increased competition in this field in terms of getting the insurance markets to provide wider/greater cover for liability risks.

The 2004 Paris/Brussels Amendments allow a contracting state to have unlimited liability. This is arguably a step towards normalising the global nuclear liability regime. We have already seen states introducing unlimited liability - for example, Austria, Germany Switzerland and Japan. There are also indications that Finland, Sweden and Denmark will follow. The operators who are exposed obviously do not carry unlimited insurance but they do maintain security to cover some of the liability. There is obviously a wider political issue but unlimited liability is something that some states are implementing or seriously considering and it would be interesting to understand whether this is being considered by the UK.

The Working Group hopes the above comments are of use and looks forward to providing a more detailed analysis in due course. We would also like to extend an invitation to you and your colleagues to address the Working Group to explore further not only the Government's current thinking but also the rationale underpinning that thinking. We believe this could provide a very useful sounding board for the airing of ideas and also help the Working Group engage more fully within the consultative process, to represent the views of the industry and work the Government to achieve the best outcome.

I look forward to hearing from you with a view to setting an appropriate time for a meeting.

Kevin Smith

Co-Chair NIA Legal Affairs Working Group