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Splitting the Atom … From Environmental Law

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Introduction

In March 1957, two separate treaties were signed in Rome, one establishing the European Economic Community ("the Treaty of Rome") and the other establishing the European Atomic Energy Community ("the Euratom Treaty"). From these two founding treaties grew two separate streams of European legislation, one under the Euratom treaty specific to the use of atomic energy and the other under the Treaty of Rome which gradually developed over time to encompass a broad range of topics, including environmental law.

More than a decade before the European Community developed its first environmental legislation in the 1970s, a number of key international treaties were adopted which provided a separate and exclusive third party liability regime for nuclear installations ("the Conventions"). These regimes were transposed into the legal systems of contracting states and, although varied on a number of occasions, generally remain the basis of the nuclear liability regime in Europe today.

In this article we will briefly examine the development and separation of nuclear and environmental law before considering the arguments for its re-integration in the context of the implementation of the EU Directive 2004/35/EC on environmental liability with regard to the prevention and remediation of environmental damage ("ELD").

With the current nuclear liability regime providing lower levels of environmental protection and limiting the liability of nuclear operators, the continued exclusion of nuclear installations and radioactive waste from the scope of more stringent environmental protection measures under the Treaty of Rome, is a point of contention for environmentalists, non-nuclear Member States and anti-nuclear campaigners.

1 The Development of Nuclear Law

(a) The Euratom Treaty 1957 and the Basic Safety Standards Directives

In the face of energy shortages in the 1950s, six states founded the Euratom Community[1] to improve their longterm security of energy supply and facilitate the development of a civil nuclear industry in Europe.

In order to achieve this aim the Euratom Treaty recognises the importance of establishing and enforcing uniform safety standards to protect the health of workers and the general public.[2] As a result, Article 30 of the Treaty requires basic standards[3] for the protection of the health of workers and the general public against the dangers arising from ionising radiations. This obligation led to the adoption of a Basic Safety Standards Directive in 1959, the current iteration of which must be transposed into domestic legislation of Member States by February 2018.[4]

The radiation protection regime established under the Basic Safety Standards Directives aims to ensure that individuals, society and the environment are adequately protected against radiological hazards covering both practices and interventions.[5] The regime operates by establishing a hierarchy of principles applicable to all nuclear-related activities which includes:

(i) **justification**: that a proposed activity will provide sufficient benefit to justify any detriment caused;

(ii) **optimisation**: exposure is kept as low as is reasonably achievable; and

(iii) **dose limitation**: limits on radiation doses for individuals.

These radiological protection principles provide an envelope for all nuclear legislation covering the design, siting, construction, licensing, operation and decommissioning of nuclear installations through which proactive protection of the environment is achieved. Reactive compensation for nuclear damage is then provided by domestic legislation transposing the requirements of the Conventions.

(b) The Paris Convention on Third Party Liability in the field of Nuclear Energy 1960

On 29 July 1960, the Paris Convention on Third Party Liability in the field of Nuclear Energy was adopted ("the Paris Convention"). In general the Paris Convention defines the conditions under which nuclear liability is incurred, provides remedies and seeks to ensure that sufficient means for compensation are available for victims of a nuclear incident. The key elements of the Paris Convention are as follows:

(i) **Exclusive, absolute and strict liability of the operator**: the most central principle, unique to the field of nuclear law, is that the nuclear operator is exclusively liable for damage falling within the scope of the Convention ("nuclear damage") resulting from accidents occurring at its installation or during transport of nuclear substances to and from that installation.[6] This principle is referred to as the 'channelling' of nuclear liability to the operator and means that, subject to a limited number of exceptions, exclusive liability is channelled to the operator of the nuclear installation regardless of any fault or negligence on its part ("strict liability") to the exclusion of all other potentially liable persons and, crucially, any other applicable law.[7]

(ii) **Heads of damage**: the heads of damage for which compensation is currently provided are injury to, or loss of life of, any person and damage to, or loss of, any property caused by a nuclear incident involving nuclear matter at a nuclear installation or during the transport of nuclear substances to or from an installation.

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(iii) **Maximum liability**: the Convention also sets out a maximum liability of the operator in Special Drawing Rights ("SDRs").[8] In the UK this translates into a limit of liability of £140 million.[9] Once the most recent amendment to the Paris Convention is transposed into UK law this limit will rise to £700 million, and then rise by a further £100 million per year, up to a total of £1.2 billion.

(iv) **Mandatory financial security**: the nuclear operator must have financial or other security in place in order to meet its liability as and when it becomes due. The type of security is not specified but must be approved by the competent public authority specified in the national legislation.

(v) **Limitation period**: the right to compensation under the Paris Convention is extinguished if the claimant does not bring its claim within 10 years from the date of the nuclear incident, although national legislation can establish a longer period.

(vi) **Jurisdiction of claims**: in general, the courts of the state where the nuclear incident occurs are awarded jurisdiction to deal with compensation claims arising from an incident.

(vii) **Geographical scope**: the Paris Convention generally covers claims from Contracting Parties for nuclear damage caused by an incident in another Contracting State. It does not currently apply to damage incurred in or by a non-Contracting State.

(c) The Brussels Supplementary Convention 1963

The Brussels Supplementary Convention is supplementary to the Paris Convention and designed to provide funds additional to the operator liability amounts[10] under the Paris Convention. It is based on the same principles as the Paris Convention.

(d) The Vienna Convention on Civil Liability for Nuclear Damage 1963

The Vienna Convention of 21 May 1963 is open to all Member States of the United Nations or any of the specialised agencies or the International Atomic Energy Agency ("IAEA"). Whilst it is based on similar legal principles to the Paris Convention, it differs in its application. For example, the Vienna Convention provides that Contracting Parties[11] can limit operator liability to 'no less than $5 million'.[12]

(e) The Joint Protocol relating to the application of the Vienna Convention and the Paris Convention 1988

Following the Chernobyl incident in 1986, it was recognised that the geographical scope of nuclear liability instruments and their application should be widened and harmonised. In addition, whilst the Paris and Vienna Conventions were already in place based on similar principles, they each operated in isolation with no uniformity or harmonisation to effectively deal with claims in the event of a nuclear incident.

The Joint Protocol entered into force on 27 April 1992 aiming to bridge the differences between the Vienna and Paris Conventions through providing Contracting Parties to the Joint Protocol with the benefits of both Conventions. Therefore, for example, if a nuclear incident occurs in a Vienna Convention/Joint Protocol Contracting State and damage is incurred by an individual of a Paris Convention/Joint Protocol Contracting State then the injured individual can claim against the liable operator in the same way as if the operator was in a Paris Convention state.[13]

(f) 1997 Vienna Protocol

The 1997 Vienna Protocol increased the operator liability to a minimum of 300 million SDRs and substantially increased both the heads of damage and the limitation period for claims for personal injury to 30 years. The geographical scope of the Convention has also been extended and provides for jurisdiction of coastal States over actions involving nuclear damage during transport.[14]

(g) 2004 Protocol to Amend the Paris Convention on Nuclear Third Party Liability ("2004 Paris Protocol")

The Paris Convention has been amended by Protocols adopted in 1964, 1982 and 2004. The 2004 Paris Protocol, adopted on 12 February 2004 but not yet in force, brought the Paris Regime more in line with the Vienna Convention as amended by the 1997 Vienna Protocol. Its principal objective is to provide a larger amount of compensation to a wider class of third parties, constituting a number of fundamental changes to the Paris Convention and to the scope of operators' liability for nuclear damage.

For the purposes of this article, the key change[15] effected by the 2004 Paris Protocol is the widened definition of nuclear damage, which specifically includes:

(i) the costs of measures of reinstatement[16] of impaired environment, unless such impairment is insignificant, if such measures are actually taken or to be taken;

(ii) loss of income deriving from a direct economic interest in any use or enjoyment of the environment, incurred as a result of a significant impairment of that environment; and

(iii) the costs of preventive measures,[17] and further loss or damage caused by such measures.

Of particular note is that the 2004 Paris Protocol will only come into force following ratification by at least five Contracting Parties. However, those Contracting Parties who are also part of the European Union (which therefore represent the majority) have agreed to ratify the amendments at the same time,[18] which cannot be done until each of these EU Member States have implemented changes to their national legislation.

Until the 2004 Paris Protocol comes into force, the un-amended Paris Convention remains applicable which only provides compensation for personal injury and property damage and excludes the application of any other legislation to nuclear installations and nuclear incidents.

(h) The Convention on Supplementary Compensation for Nuclear Damage ("the CSC")

The CSC was opened for signature in September 1997 and finally came into force on 15 April 2015 following ratification by Japan in January 2015.[19] Signatory countries that have ratified the instrument to date are the United States, Argentina, India, Montenegro, Morocco, Romania and the United Arab Emirates. A further 12 States have signed but not yet ratified the instrument.[20]

The CSC aims to supplement the compensation amounts already available under national law of the Contracting Parties providing a similar tiered approach to the Brussels Supplementary Convention.[21] Importantly, the CSC is an umbrella instrument open to all countries that incorporate the basic principles of nuclear liability law into their domestic law and that adopt a common approach on compensation, the definition of nuclear damage and the jurisdiction for claims. It is viewed by some as the only single instrument that could create the foundation for a common global nuclear liability regime.

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2 Development of General Environmental Law Under the Treaty of Rome

Over a decade after the adoption of the first BSS Directive and the coming into force of the Conventions, the European Community adopted the first of a number of environmental action plans ("EAPs") in November 1973,[22] which culminated in the adoption of the first waste[23] and drinking water quality[24] directives in 1975.

Despite a number of subsequent EAPs,[25] it was not until the Single European Act 1987 ("the Act"), however, that the Treaty of Rome contained a chapter dedicated to environmental law. The Act established the Community's broad environmental objectives, some key principles (including the principle of preventative action and 'polluter pays'), and provided that environmental protection requirements should be a component of the Community's other policies.[26]

Following the fourth,[27] fifth[28] and sixth[29] EAPs and during the first 13 years of the seventh,[30] a body of environmental law has developed under the Treaty of Rome which is generally separate[31] from nuclear legislation developed under the Euratom Treaty. Those instances where environmental law does apply to nuclear operators/installations tend to be confined to more administrative or procedural requirements which did not conflict with nuclear regulation, such as legislation transposing the requirements of the Aarhus Convention or Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.

EU Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage ("the ELD")

The ELD establishes a framework of environmental liability based on the 'polluter pays' principle in order to prevent and remedy environmental damage. The aim of the ELD is to ensure that an operator whose operations cause environmental damage is financially liable for remediating the damage concerned and as such is incentivised to prevent such damage occurring in the first place.

With the proposed ELD imposing more stringent requirements on operators than the existing nuclear liability regime, it is perhaps unsurprising that Member States without nuclear power, such as Ireland, Austria and Luxembourg, and a body of MEPs, campaigned for nuclear installations to be included within the scope of the ELD during its passage through the European Parliament.

Although not available during passage of the ELD through the European legislative process, a Technical Report on the Effectiveness of the ELD published in 2014[32] provides a useful comparison of the two regimes:

(a) **Compensation regime *versus* remediation regime**: unlike the ELD the Conventions only compensate and do not require operators to prevent or remediate an imminent threat of, or actual environmental damage.

(b) **Emphasis on human interests rather than on reducing loss of biodiversity**: despite the extension/proposal to extend the heads of damage the emphasis of the Conventions remains on the payment of compensation to persons harmed rather than preventing loss to biodiversity or ensuring remediation so there is not net loss of biodiversity.

(c) **Nuclear damage**: under the Conventions and the ELD, impairment to the environment must be significant but the Conventions to not establish criteria for determining a significance threshold, leaving the court of a contracting state to decide if impairment is significant once a compensation claim has been made. There is also some uncertainty as to the extent of any obligation under the Conventions for nuclear operators to compensate others who prevent or remediate environmental damage. What seems clear is that there could be substantial differences in the way different Member States implement the Conventions, with a high likelihood that the degree of environmental protection achieved will be less robust that that provided under the ELD. It is also noteworthy, however, that the whilst the Conventions include claims for damage to fauna and flora, the ELD only covers those species and natural habitats protected under the Birds and Habitats Directives.

(d) **Exceptions and defences**: whilst both the Conventions and the ELD provide exceptions for damage caused from armed conflict, hostilities, civil war or insurrection, in allowing a further exception for a natural phenomenon of exceptional, inevitable and irresistible character, the scope of the ELD is arguably narrower than the Conventions.

(e) **Limit on liability**: whilst the Conventions limit the operator's liability, the ELD provides for unlimited liability. It should be noted, however, that unlike the ELD, the Conventions legally channel liability to the operator for which it is strictly liable and is obliged to insure.[33] It is often argued that the concept of unlimited liability applied to private companies provides false comfort as, in practice, a private company faced with unlimited loss will quickly become insolvent, leaving a potentially greater proportion of the conduct and costs of environmental remediation to the host government. This argument is particularly acute in the nuclear regime where the operator holds particularly specialist expertise which can greatly assist in managing an installation and/or the remediation of radioactive contamination.

(f) **Polluter pays**: the legal channelling of liability and the strict nature of such liability under the Conventions is arguably more favourable than the 'polluter pays' regime in the ELD on the basis there is no need for a victim to go through the potentially difficult exercise of determining who is liable for given environmental damage and to what extent.

Following a number of robust representations from the Member States during the legislative process, the ELD was ultimately adopted with the following exception at Article 4(4):

> "*[N]uclear risks or environmental damage or imminent threat of such damage as may be caused by the activities covered by the Treaty establishing the European Atomic Energy Community or caused by an incident or activity of which liability or compensation falls within the scope of any of the international instruments listed in Annex V*[34]*, including any future amendments thereof*."

In a memorandum by the Commission[35] addressing the question of types of environmental damage covered by international liability regimes rather than the ELD, the following explanation is provided:

> "*Nuclear activities are covered by several international civil liability conventions. These conventions, too, are based on strict liability. They mainly deal with traditional damage, but in addition allow governments to cover environmental damage, albeit in a less co-ordinated way. A protocol that aims to improve the regime of one important Convention (the Paris Convention) with respect to environmental damage has been negotiated under the auspices of the Nuclear Energy Agency of the OECD where almost all Member States (13 out of 15) are represented.*"

The first part of the exclusion relates to "*nuclear risks or environmental damage or imminent threat of such damage as may be caused by the activities covered by the Treaty establishing the European Atomic Energy Community*". Although the wording of this exclusion seems to suggest that any *activity* covered by the Euratom Directive is exempt from the ELD, if this were correct there would be no need to include the second part of the exclusion relating to the international instruments listed in Annex V. As a result, the

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authors of the technical report to the European Commission on the effectiveness of the ELD in February 2014[36] suggest that the first part of the exclusion relates only to nuclear liability provisions which may arise under the Euratom Treaty, pointing out that whilst no such provisions exist, the adoption of such provisions under Article 98 has been discussed in the past and could be revisited in the future.

The second part of the exclusion is also unclear. Whilst the wording suggests that the ELD should only be barred to the extent that liability or compensation actually falls within an Annex V convention, it is reported that Article 4(4) is perceived to completely exclude the ELD in Member States in which an Annex V Convention is in force[37] whether or not liability of compensation is actually covered by the Annex V Convention in question. Although this position seems difficult to reconcile with the wording of Article 4(4) of the ELD it does, for example, reflect the requirement in the Paris Convention which clearly states that no other legislation can be applied to nuclear installations.[38]

Conclusion

What seems clear is that a fundamental consideration of the European Parliament in agreeing to the exclusion of nuclear installations from the scope of the ELD was an assumption that the ratification of the 2004 Paris Protocol was imminent. With the definition of nuclear damage widened under the 2004 Paris Protocol to specifically include environmental damage, it seems the European Parliament was satisfied that the degree of divergence between the Conventions and the ELD was acceptable.

It is worth noting, however, that the exception in the ELD was conditional on the EU periodically revisiting the exclusion to ensure that there are appropriate safeguards for the environment under international nuclear liability regimes. Whilst the first review, undertaken in 2013, concluded that the exclusion should remain in place, a large part of the analysis undertaken again assumed the 2004 Paris Protocol was in force. It remains to be seen therefore whether prolonged delay in ratification of the 2004 Paris Protocol may prompt the European Parliament to attempt the fusion of atomic and environmental law. Previous attempts to do this in the UK have been less than successful[39] and, whilst policy issues are outside the scope of this paper for the legal reasons given, nuclear and environmental law should remain 'split'.

Endnotes

1. Belgium, France, Germany, Italy, Luxembourg and the Netherlands.
2. Article 2(b) of the Euratom Treaty.
3. Basic standards are defined in Article 30 as including: (a) maximum permissible doses compatible with adequate safety; (b) maximum permissible levels of exposure and contamination; and (c) the fundamental principles governing the health surveillance of workers.
4. Council Directive 2013/59/Euratom which incorporates the International Basic Safety Standards for Protection against Ionising Radiation and for the Safety of Radiation Sources published by the IAEA.
5. Section 4.2 of the IAEA Handbook on Nuclear Law.
6. Article 6(a) and (b) of the Paris Convention.
7. Article 6(c)(ii) provides that "*the operator shall incur no liability outside this Convention for damage caused by a nuclear incident*".
8. Article 7 of the Paris Convention. It is based on a basket of key international currencies which is reviewed and adjusted every five years. The maximum liability stated in the Paris Convention is SDR 15 million and the minimum liability is SDR 5 million. However, the NEA recommended that the Contracting Parties to the Paris Convention set their maximum liability to not less than SDR 150 million which has been implemented by the majority of parties. However, as highlighted by the European Commission, Final Report DG TREN/CC/01-2005: Legal Study for the Accession of Euratom To the Paris Convention on Third Party Liability in the Field of Nuclear Energy produced by Gomez-Acebo & Pombo, Abogados SCP , there remain large discrepancies of liability limits across all signatory States: see http://mng.org.uk/gh/private/2009_12_accession_euratom.pdf.
9. For certain prescribed sites where risks are lower, the limit of liability is £10 million.
10. 175 million SDRs from the host state and a further 125 million SDRs from a combined fund of all Contracting States.
11. Contracting Parties include Eastern European States, such as the Czech Republic, Poland and Estonia, South American countries such as Argentina, Chile and Peru, also Morocco and Russia. See https://www.iaea.org/sites/default/files/liability_status.pdf.
12. Article 5 of the 1963 Vienna Convention: this figure is based on the value of the US dollar in terms of gold on 29 April 1963.
13. The Contracting Parties include a number of Western European States such The Netherlands, Germany and Italy; Eastern European States such as Latvia and the Czech Republic; and others such as Egypt and Uruguay.
14. Contracting States including: Argentina; Belarus; Bosnia and Herzegovina; Jordan; Kazakhstan; Latvia; Montenegro; Morocco; Poland; Romania; Saudi Arabia; and the United Arab Emirates have ratified or acceded to this Protocol.
15. Other changes include a widened class of claimants, increased limitation period for claims, increased financial liability limits, changes to the regulation of nuclear liability during transport and a widened definition of nuclear installation.
16. "Measures of reinstatement" means any reasonable measures which have been approved by the competent authorities of the State where the measures were taken, and which aim to reinstate or restore damaged or destroyed components of the environment, or to introduce, where reasonable, the equivalent of these components into the environment. The legislation of the State where the nuclear damage is suffered shall determine who is entitled to take such measures.
17. "Preventive measure" are broadly defined in the 2004 Paris Amending Protocol as "*any reasonable measures taken by any person after a nuclear incident or an event creating a grave and imminent threat of nuclear damage has occurred, to prevent or minimise nuclear damage ((a)-(e))*".
18. Council Decision 2004/294/EC of 8 March 2004 authorising the Member States to ratify, in the interest of the EC, the Protocol of 12 February 2004 amending the Paris Convention, OJ L 97/53.
19. https://www.iaea.org/publications/documents/treaties/convention-supplementary-compensation-nuclear-damage.
20. https://www.iaea.org/sites/default/files/supcomp_status_15012015.pdf.
21. Above the level provided for by the national legislation, the supplementary tiers provide additional compensation for a minimum 300 million SDR provided by the Installation State (based on the Vienna Convention's first tier of 300 million SDRs), and a minimum 300 million SDR provided by a fund of all Contracting States. Contributions are calculated upon the basis of installed nuclear capacity per state and UN rate of assessment per MW thermal (see http://ola.iaea.org/ola/CSCND/Calculate.asp).

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22. OJ C112/1 from 20 December 1973.
23. Directive 75/442/EEC on waste.
24. Directive 75/440/EEC concerning the quality required for surface water intended for the abstraction of drinking water in Member States.
25. The second EAP between 1977–1981 and the third EAP between 1982–1986.
26. Title VII of the Single European Act 1986: Articles 130r; s; and t.
27. 1987–1992.
28. 1992–1995.
29. 1997–2003.
30. 2003–2020.
31. See, for example, Directive 2008/98/EC on waste which still excludes radioactive waste from its scope and Directive 2008/1/EC which relates to pollution caused by substances but excludes radioactive substances as defined in the BSS Directive.
32. Technical Report – 20014 – 2087: Study on ELD Effectiveness: Scope and Exceptions, Final Report, 19 February 2014 (http://ec.europa.eu/environment/legal/liability/pdf/BIO%20ELD%20Effectiveness_report.pdf).
33. Although Bulgaria, the Czech Republic, Greece, Hungary, Portugal, Romania, Slovakia and Spain have included requirements for operators to provide financial security in their domestic legislation implementing the ELD.
34. Annex V refers to the Paris Convention, the Vienna Convention and the Convention on Supplementary Compensation for Nuclear Damage.
35. European Commission, Questions and Answers Environmental Liability Directive (Memo/04/78, 1 April 2004). Available at http://europa.eu/rapid/press-release_MEMO-04-78_en.htm.
36. See Section 6.2.6 on page 226 of the Technical Report on the Study of ELD Effectiveness: Scope and Exceptions dated 19 February 2014.
37. Technical Report on the Study of ELD Effectiveness: Scope and Exceptions dated 19 February 2014.
38. Article 6(c)(ii) provides that "*the operator shall incur no liability outside this Convention for damage caused by a nuclear incident*".
39. See, for example, the original proposals to extend the UK contaminated land regime to cover land contaminated with radioactive substances from ongoing nuclear activities.

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Ian's practice encompasses nuclear, commercial and environmental law. Ian has advised on a number of nuclear new build projects across the globe as well as a wider range of nuclear regulatory issues in the UK and across Europe. Having worked as Deputy General Counsel to the Hinkley Point C project in the UK, Ian is one of the few private practice lawyers in the UK with first-hand experience of consenting a nuclear power station under the current UK regulatory regime.

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