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In this issue

Editorial: Environment - a Chinese concern page 2
By David Boitout, partner.

**Regulatory Framework and Risk Prevention for Chinese
Outbound Investments**page 3
Associates Laure Deron and Chen Aiwa outline the regulatory framework for
Chinese outbound investment and explain how to limit some of the risks.

China's days in the sun page 5
Associates Gilles Cardonnel and Ann Yan provide an update on the legal
framework for China's overheating renewable energy sector.

Nuclear Liability in the People's Republic of China page 7
Associate Ximena Vásquez-Maignan gives an overview of the development of
the nuclear sector in China and considers the nuclear liability regime.



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Editorial

Environment – a Chinese concern

There is no doubt that the 2009 United Nations Climate Change Conference, commonly known as the Copenhagen Summit, was a failure in many ways. In particular, it failed to produce a legally binding treaty which included commitments for reducing emissions enough to keep temperature rises below 2°C. Many blamed the Summit's failure on developing countries arguing that India, China and other emerging nations cooperated to prevent legally binding targets for carbon emissions in order to protect their economic growth.

Given that China's economic growth is still largely fuelled by high-polluting and cheap energy sources (mainly coal), the unwillingness of China to agree now on binding carbon emissions targets could indeed be regarded as a reason for the failure of the Copenhagen Summit. However, we do not think that this means that China is not serious about environmental issues and climate change.

Over the past few years China has developed, and continues to develop, one of Asia's most dynamic and comprehensive environmental legal frameworks. This framework is evolving from a control and sanctions based one to an incentive framework designed to ensure balanced, sustainable development and GDP growth.

As such, the Ministry of Environmental Protection has launched several measures over the past two years to encourage industry to take into consideration environmental compliance and sustainable development. These include various tax incentives and subsidies to support sustainable development at both central and local levels.

In addition, clear targets have been set for 15% of China's power generation to come from renewable energy sources by 2020 and recent amendments to the Renewable Energy Law are expected to help boost investments in non-fossil fuel based power sources such as wind, solar, hydropower, biomass and geothermal.

Obviously, there is still room for improvements. Firstly, enforcement of the existing environmental laws and regulations has to improve. Indeed, the real decision making power lies with local governments and not the environmental protection authorities. This often leads to the protection of local polluting industries thus reducing the effectiveness of environmental monitoring and control by the local environmental protection authorities. Secondly, discriminatory policies on foreign investment in the energy sector need to be removed as current limitations in renewable energy and Clean-Development (CDM) projects are preventing China from benefiting from the technologies and services of foreign companies.

■ *David Boitout*



Regulatory Framework and Risk Prevention for Chinese Outbound Investments

China's economy has definitely matured and the past few years have seen a growing trend of Chinese companies joining the international stage as foreign investors. In the midst of the current economic downturn many opportunities have emerged for investors, with a sharp drop in the price of overseas assets. For Chinese companies, it is a "going out" time. However, along with this enthusiasm, another key element for the success of an outbound investment is a reasonable dose of prudence and awareness, to ensure that no major obstacles arise either at home or in your destination country.

Know your rules at home

Under the current legal Chinese framework, Chinese companies which contemplate an outbound investment must secure a set of regulatory approvals beforehand. This is done by submitting their project to the following administrations: the National Development and Reform Commission ("NDRC"); the Ministry of Commerce ("Mofcom"); the State Administration of Foreign Exchange ("SAFE"); and, if the would-be investor is a State-owned enterprise, the State-Owned Assets Supervision and Administration Commission ("SASAC"). These precautionary procedures whereby the government will study the merits of an investment project abroad, though burdensome and time-consuming, are designed to protect Chinese businesses from venturing unconsciously into the risks of investing overseas.

Recently, the Chinese government has implemented a series of measures to encourage domestic enterprises to dive into international waters. These are;

- The *Measures on Overseas Investment Management* by the Mofcom (16 March 2009) which is designed to provide support to the investing candidates, by delegating the approval authority to its provincial branches and streamlining the approval process.
- The *SAFE Regulations on Foreign Exchanges Administration in Relation to Direct Overseas Investment by Domestic Entities* (Hui Fa [2009] No.30) which further simplify the procedures (i.e. the review of sources of investment funding and remittance of the funds now only requires a filing submission, as opposed to a prior approval), expand the opportunities to use foreign currency funding for

investment overseas, and implement financial support for overseas direct investments.

- A set of *Measures on Foreign Economic and Technical Cooperation Funds* (Cai Qi [2005] No. 255 and Cai Qi [2009] No.95) which were jointly issued the Mofcom and the Ministry of Finance. They provide for financial support to domestic enterprises investing abroad, including partial reimbursement of legal counsel, financial advisor, technical investigation and feasibility study fees, insurance fees for mining resources shipped back to China and patent registration fees, as well as subsidise loans obtained from domestic banks in order to finance the operation of projects abroad.
- NDRC and the Export-Import Bank of China jointly set up credit support mechanisms granting preferential loans to encourage five types of overseas investments. While the NDRC has the authority to approve a project, the Export-Import Bank of China has the final decision regarding the granting of any loans.

Meanwhile, local governments have also enacted similar measures with a view to encouraging domestic enterprises to "go global".

Know the rules abroad

For Chinese companies which are profitable and expanding, investing abroad is an exciting prospect. But, as always when swimming in new waters, caution should be exercised as language barriers, cultural differences and an unfamiliar legal environment may turn your venture abroad into a nightmare. There are ways around the obstacles, though, and a reasonable amount of preparation and sensible judgement will better ensure success. Set out below are a few recommendations to avoid the most typical mistakes, gathered during the course of our time as legal advisors for Chinese enterprises on overseas M&A projects:

- **Prepare for you arrival!**

Once the investment scheme is carried out, your resources will be focused on reacting to the myriad of urgent problems of daily management, with very little time for analysis and planning. So, use the time before investing to study the business and legal environment in which you are about to land. Find out about the tax, corporate governance, contractual, labour, environmental and IP applicable rules and the local constraints on foreign investment (外资准入) and exchange. Also, consider your exit options: in certain



countries, winding-up an unsuccessful company can be a long and cumbersome process.

For an outbound acquisition, study the target carefully by conducting a thorough due-diligence. As this step is common practice in many Western countries, both the seller and the management of the target will normally accept to share information about the company with you, so you should take advantage. This cautious approach will help you to become acquainted with the legal standing, compliance, material defects of the target and strengthen your bargaining power during the negotiations while at the same time allowing you to make well informed decisions once you are in charge of the local company.

- **Do not neglect the transaction scheme**

Many Chinese enterprises with only a recent experience in cross-border investments tend to overlook the transaction or investment framework while they investigate the target company and market.

However, proper structuring - or, in some cases, restructuring - at the time of the investment can be instrumental in laying the foundations for good business operations and tax planning. Similarly, achieving the optimum financing scheme will require that you explore all tax, foreign exchange and operational aspects beforehand. Examine all investment options with your professional advisors, and compare the various schemes for shaping the transaction with a view to maximize your profits and minimising the legal and financial risks.

- **Secure proper legal advice**

The local laws will determine your rights and influence your daily decisions for many years to come, so you should know them in order to avoid unpleasant surprises. Reliable, comprehensive, tailor-made legal advice that really fits your needs and situation can only be provided by a professional counsel, so it is advisable to hire a lawyer early in the process.

As we found out, Chinese in-house teams are sometimes reluctant to work hand-in-hand with their outside consultants, a combination of cost-saving considerations and distrust resulting in last-minute instructions for a limited scope of assignment. This will almost always result in inconsistencies in the contractual documentation, as the master and the ancillary agreements are prepared separately, which in turn makes their enforcement more difficult. Also, we would warn against a do-it-yourself approach that substitutes the application of self-taught legal practice for a

professional adviser. Relying solely on information gathered on the internet or at some local administration is risky as the information supplied may be incomplete or outdated. Even the best formulated and codified laws come with a practical interpretation which is uneasy to find for non-professionals.

Your lawyer is there to help, and can only do so efficiently if he knows what you want and where you are going. Explain your expectations and provide a comprehensive picture, both in terms of the transaction itself and of the future business model. Keep your lawyer involved so that he knows how the situation unfolds and can track the issues. This will help keep the costs low by identifying and avoiding problems early, create a cooperative climate for negotiations and ensure quality and consistency in the legal documentation.

- **Prevention works better than remedy**

Even successful investments face problems. In our experience, it is a common mistake for young Chinese international investors to wait until a problem has materialised to take action. They often incur significant costs in order to remedy a situation in which anticipation would have saved much time and energy.

Anticipation involves proactive, timely communication with the local teams, and discussing the options with the professional advisors at early stages of the investment to identify potential risks.

- **When in Rome, do as the Romans do!**

Adapt to the business ways of your host country. It is important that your local partners know what to expect from you. This will prove valuable in the long-term, both in managing the enterprise and in dealing with overseas competitors. However, always remember that an easy-going approach towards corporate and business rules, especially in the case of individual enterprises, will prove a recipe for fiasco if exported. Make sure that while you adapt to local expectations, your standards of adhering to the applicable legal rules both at home and abroad remain high.

- **Think long-term, and communicate accordingly**

Model your investment structure and attitude according to your plans in the long-term. Your first approach of the country is a crucial moment, and the first impression you make on the local players will determine your market position, legal protection and reputation for many years to come.



Communicate regularly with your local contacts so that they have a clear understanding of what your strategy is. During the preliminary negotiations, explain to them about your constraints at home to ensure that they do not wrongly attribute delays to a lack of goodwill on your part due to their unawareness of the Chinese regulations on overseas investments. Understand and respect your local partners as well as their negotiating practice. Western or African negotiators will usually not expect a contract to be re-discussed, once finalised and signed. This can be to your advantage as a comprehensive set of warranties in a partnership agreement, coupled with efficient judicial enforcement of such contractual provisions, offers serious guarantee against future disappointment. Reassure the personnel of the target as to what your business orientation and direction will be after you take over. Managing the company will be easier in the long run if the local management team trusts you and is willing to come forward with information on the status of the company and the on-going issues, as well as support your business decisions.

■ *Laure Deron and Chen Aiwa*

China's days in the sun

In 2005, the Chinese Government announced aggressive targets for the development of renewable energy including the aim of 15 percent (minimum) of power generation to come from clean, green sources by 2020. Five years on, renewable energy sources currently account for 9 percent of power generation in China. However, the growth has not been without problems and the government has modified the supporting legislation recently in a bid to address some of the issues. This article sets out those amendments and considers some of the impacts on China's domestic solar sector.

History of the applicable legislation

At the outset it is worth noting that the encouragement of foreign investment in the construction and operation of solar power plants by the Chinese Government can be traced back to 1995 when the *Catalogue of Guidance on Foreign Investment* was first introduced. It is still encouraged following amendments to the Catalogue in 2007.

In January 2006, China implemented the Renewable Energy Law (REL) to encourage and regulate the necessary growth in the industry. The REL's main features were the introduction of (i) an obligation on grid utilities to connect and purchase the full amount of

electricity generated from renewable energy sources, (ii) an electricity tariff incorporating a surcharge to cover the additional costs of producing and transmitting renewable energy, and (iii) financial subsidies and tax incentives to encourage the development of renewable energy projects.

Following the enactment of the REL, the National Reform and Development Commission (NDRC) published specific targets for each source of renewable energy, setting the target for solar energy to a capacity of 1.8 GW by 2020, up from 70 MW in 2005.

The policies put in place resulted in spectacular growth in China's clean energy sector, particularly in the number of wind power projects. However, the experience of the past five years has highlighted the need for coordination and rationalisation of the expansion of the renewable energy sector in China. For example, a large number of alternative energy generating projects have been developed in areas where the transmission infrastructure is either non-existent or insufficient. A large number of wind farms have been built in remote locations such as Inner Mongolia and remain unconnected to any transmission lines.

The government has recognised the need for greater coordination, better strategic development and more rationalisation of the industry. In late December 2009, the Standing Committee of the National Congress approved amendments to the REL and the State Council promulgated a policy statement encouraging further investment, particularly from foreigners. The policy changes are designed to address some of the issues encountered by the sector so far, including the need for better planning of the expansion of renewable energy capacity and ensuring the development of adequate grid infrastructure and technology to ensure transmission of the electricity generated by new projects.

Main features of the REL and related regulations

The REL, together with the *Regulation on the Administration of Power Generation from Renewable Energy* issued in January 2006 by the NDRC and the *Measures on Supervision and Administration of Grid Enterprises in the Purchase of Renewable Energy Power* issued in September 2007 by the State Electricity Regulatory Commission (SERC), established a compulsory grid connection principle. The so called "full amount purchase system" requires grid companies to purchase the electricity produced by alternative power sources within their area of coverage and to provide the necessary services required to support the connection of that electricity to the grid.



In order to regulate the cost of renewable energy, the REL provides that the State Council has overall responsibility for establishing the price. The REL also addresses the issue of the higher production and transmission costs of renewable energy (compared with conventional sources of electricity) by introducing a surcharge, payable by electricity end users and allocated to grid utilities.

As previously mentioned, the REL also sets out various financial incentives to encourage growth in the renewable energy industry. These include funding subsidies for the research, construction and production of new energy sources and projects. The legislation also grants subsidies permitting financial institutions to provide funding to renewable energy industries with preferential lending terms, such as reduced loan interest rates. In addition, tax breaks were also made available for certain renewable energy projects, including solar energy projects.

The implementation of the REL measures was followed by a rapid expansion of China's domestic renewable power capacity. However, many of the new projects were undertaken without sufficient research, preparations and planning, partly because their sponsors relied heavily on government support and subsidies. It also became apparent that many grid utilities struggled to meet their purchase and connection obligations under the REL. In December 2009, the Chinese Government made amendments to the REL in a bid to address some of the issues.

Amendments to the REL

The main purposes of the amended REL are to (i) rationalise the expansion of the renewable energy sector, (ii) improve the compulsory connection principle introduced in the original REL, (iii) insist on the necessity to upgrade the existing transmission infrastructure, and (iv) consolidate the sources of funding for the upgrade and roll-out of the transmission infrastructure.

(i) Rationalisation of expansion of renewable energy sector

To ensure the rational and coordinated development of renewable energy generation at national level, the amended REL introduces an obligation for provincial plans approved by provincial governments to be registered at the national level with the NDRC and the SERC.

(ii) Improvements to the “full amount purchase system”

The original REL did not provide specific detail in regard to the “full amount purchase system” and did not specify the respective obligations of both the operators of the power plants and the grid utilities. The amended REL now specifies how the “full amount purchase system” is to be implemented. Consequently, the amended REL sets forth new requirements for the NDRC to (i) determine the amount of electricity to be generated from renewable energy sources as a proportion of overall electricity generation during a certain planning term (based on national plans), (ii) formulate detailed measures to be adopted by grid utilities so they purchase in advance and dispatch the full amount of electricity generated by the renewable energy source, and (iii) supervise the implementation of these obligations by grid utilities. The amended REL also introduces conditions that a renewable energy project must satisfy to be entitled to enter into a connection agreement with the relevant grid utility. Such conditions are: that the relevant power plant has been built according to the applicable national plan and provincial plan for development and use of renewable energy; that all necessary approvals and filings have been completed in relation to such project; and that the power plant satisfies the technical requirements for connection to the grid.

(iii) Development of new grid technologies

The development of China's transmission infrastructure currently lags behind that of renewable energy thus restricting the connection of wind farms or solar power plants to the grid. The original REL did not address the necessity to upgrade and develop the existing grid infrastructure so one of the objectives of the amendments to the REL has been to encourage grid utilities companies to upgrade their current network to include better connection of renewable energy generating units to the grid. In particular, grid utilities are required to modernise their existing equipment by adopting “smart grid” and electricity storage technology to adapt to the challenges of transmitting electricity produced from solar or other renewable energy sources, and improve the operational management of grids to enhance the connectivity of renewable energy to the grid.

(iv) Consolidation of funding for the upgrade and roll-out of grid infrastructure to implement the objectives of the REL

The surcharges that were introduced by the original REL were subject to VAT and income tax for the grid utilities and the allocation of the surcharges proved to be complex and lengthy. To address this, the amended REL creates a “national renewable energy development fund” into



which the surcharge is paid by end-users and existing government subsidies are added. The fund is administered by the Ministry of Finance and the NDRC, as well as other relevant authorities.

How do the changes benefit the solar industry?

The significance of the amendments to the REL is still being debated by legal and industry experts. Some commentators argue that the generous regulatory framework introduced by the REL in the first place created the ensuing problems encountered by the sector. Critics claim that investors are relying too heavily on governmental support rather than assessing the real demand for clean energy, including solar energy, in China.

The impact of the amended REL is yet to be felt but the regulatory framework and financial incentives introduced by the REL (and its implementing regulations) and the subsequent amendments demonstrate at least the willingness of the Chinese government to develop clean energy sources.

The strong commitment made to the solar industry by the Chinese Government via the introduction of two sets of sector specific subsidies in 2009 also further suggests this. Firstly, the Ministry of Finance committed to a subsidy of 20 RMB per watt peak generated from eligible building integrated photovoltaic projects of a capacity of at least 50kW peak. Secondly, the government implemented the "Golden Sun" pilot project offering subsidies of up to 70% of the total investments of eligible photovoltaic projects. The "Golden Sun" scheme is aimed at projects in remote and powerless regions of a capacity exceeding 300kW peak (other conditions for eligibility are that the construction must be completed within one year and the project must be operated for a period of at least 20 years).

In the short term the combination of a favourable regulatory environment and other support from Chinese authorities seems to have achieved the desired response. A number of large solar projects have recently been initiated and in January 2010, the American firm Esolar announced a joint venture, one of the largest renewable energy deals to date, with China Shandong Penglai Power Equipment Manufacturing Co. to build a series of solar "power tower" plants in China with a total capacity of 2,000 MW. The "Golden Sun" scheme also seems to be a success so far and almost 300 photovoltaic projects have been selected to benefit from the initiative. Such projects suggest that there is optimism in the industry despite the difficulties.

■ Gilles Cardonnel and Ann Yan

Nuclear Liability in the People's Republic of China

One of the major challenges for humanity this new century is to meet our growing need for energy while also minimising the climate change problems this creates. A possible solution, and alternative to fossil-fuel energy sources, that has long been considered is nuclear power as it emits virtually no air pollutants or greenhouse gases. Indeed, studies have shown that the life-cycle emissions from nuclear energy are comparable to renewable forms of energy such as wind and hydropower.

There are currently 53 nuclear power stations under construction world-wide, according to the International Atomic Energy Agency (IAEA). 51 reactors are under construction or planned in China as part of efforts to enlarge its nuclear power capacity. Although the high safety standards of the nuclear industry mean that the risk of an accident is very low, the potential consequences of a nuclear accident are such that China, as any other State engaged in nuclear power-related activities, has set up a legal regime to deal with the associated liabilities issues and compensation of victims.

This article provides an overview of the development of the nuclear sector in China and considers the country's legal framework for nuclear liability.

The development of China's nuclear industry

China's nuclear power program began in 1985 with the construction of the Qinshan Phase I nuclear power plant. Today the country has 11 reactors in operation which generate 9GW of total installed capacity and are mainly owned by two large-scale state-owned companies.

The first of these, *China National Nuclear Corporation (CNNC)*, owns (either alone or as a majority shareholder) seven reactors based on different technologies (either Canadian, French, Russian or indigenous). The second, *China Guangdong Nuclear Power Holding Corporation Ltd. (CGNPC)* owns or holds a majority stake in four reactors. Unlike CNNC, which has a pool of different technologies, CGNPC acquired its first nuclear power plants from the French group AREVA and then developed its own technology, the CPR 1000, which is based on the French technology.

The *Mid-Term Long-Term Nuclear Power Development Plan for 2005-2020* issued by the National Development and Reform Commission (NDRC). It sets out a target for nuclear power to provide around 5% - or 86GW - of the



expected country's total power capacity by 2020. To reach this goal, China will have to build around five new reactors a year, over the next 11 years.

However, CNNC and CGNPC's resources alone are insufficient to reach such an ambitious target and some of the five state-owned energy companies (i.e. China Huaneng Corp., China Datang Corp., China Huadian Corp., China GuoDian Corp. and China Power Investment Corp.) have entered the nuclear market, albeit slowly as previously they had been limited to conventional and renewable power projects. China's third nuclear champion is likely to become China Power Investment Corporation (CPI), which has teamed up with CNNC and CGNPC for several projects under construction, including one AP1000. For the time being, CPI, as well as the other energy companies, holds minority stakes in China's nuclear power projects. In this way the Government seems to be ensuring that they can acquire the necessary know-how to develop nuclear power projects alone at a later stage.

The designs which will be used for the future reactors (announced or currently under construction) include AREVA's EPR (France), Westinghouse's AP1000 (U.S.A.), AtomStroyExport's VVER 1000 (Russia) and mainly the CGNPC's CPR 1000.

Law and liability in the Chinese nuclear industry

China is not a party to any of the international conventions on nuclear third party liability, for which the basic international instruments are:

- the 1960 Paris Convention on Nuclear Third Party Liability
- the 1963 Vienna Convention on Civil Liability for Nuclear Damage
- the 1997 Convention on Supplementary Compensation for Nuclear Damage (not yet in force)

This is possibly because its immediate neighbouring countries (except Russia and the Philippines) have not yet ratified any of these conventions.

However, as mentioned above, China has provided a legal regime to ensure that those who suffer damages as a result of a nuclear accident have recourse to adequate compensation.

In the early 80s, there was not any specific legislation on nuclear third party liability. The concerns of the foreign suppliers who were to work on the construction of China's second nuclear power plant at the Daya Bay site

(Guandong province) on the matter were addressed in March 1986 by the *"Reply to the Ministry of Nuclear Industry, the National Nuclear Safety Bureau and the State Council Atomic Energy Board in respect of Handling Nuclear Third Party Liability"* (the "1986 Reply") issued by the State Council. In two decades, the involvement of the foreign suppliers decreased steadily as CNNC and CGNPC improved their mastering of the Generation 2 technologies. But in 2007, China was ready to introduce the latest nuclear (Generation 3) design developed by AREVA and Westinghouse. On June, 2007 the State Council issued a *"Reply to Questions on the Liabilities of Compensation for Damages Resulting from Nuclear Accidents"* (the "2007 Reply") once again in response to the concerns of foreign suppliers who were waiting for this update of the Chinese nuclear liability regime before signing the contracts for the EPR and AP1000 nuclear power plants.

• Significance of the Replies

When the 1986 Reply was issued, the State Council was the highest administrative authority and there was no hierarchy of laws and regulations—thus, there was no concern about the binding nature of the Reply. The legal situation changed with the entry into force of the Legislation Law in July 2000, which set up the following hierarchy:

- 1st Constitution of the People's Republic of China ("PRC");
- 2nd Laws enacted by the National People's Congress;
- 3rd Administrative regulations formulated by the State Council;
- 4th Local regulations formulated by the people's congresses of the provinces, autonomous regions and municipalities directly under the Central Government.

The Replies did not fit in this new hierarchy as they are not "administrative regulations" but are normative documents the State Council uses to release official positions to address certain issues or questions raised by a lower level government body and which function as administrative rules. Therefore the question of their binding force arose, especially with regard to the prevalence of laws which may apply in case of a nuclear incident such as the General Principles of Civil Law, the Product Quality Law, the Environmental Protection Law or the Law on the Prevention of Environmental Pollution Caused by Solid Waste.

Even though we may wonder why the State Council took the decision to address the nuclear third party liability



issue in a Reply in 2007, one may assume that it was in order to be efficient (so as to be able to sign the contracts with the foreign suppliers in a timely manner). It seems clear that the Chinese government is aware of the legal issue and expects it to be only temporary as the 2007 Reply itself provides that the “Atomic Energy Law of the People's Republic of China (Draft) shall be drafted to expressly provide for the foregoing matters”.

For the time being, the State Council and the Chinese nuclear industry consider that the Replies set forth binding rules and it is commonly believed that the PRC courts will enforce the 2007 Reply as an “administrative regulation” as there is no other legal provision specifically addressing nuclear third party liability in case of a nuclear accident in China and the Reply has been issued by the State Council, the highest administrative authority.

- **Interaction between the 1986 and the 2007 Replies**

As the 1986 Reply has not been officially revoked, and according to the general principle of law pursuant to which a new law shall prevail over the old one, the provisions of the 2007 Reply should override those of the 1986 Reply when addressing the same issue. However, some issues such as the statute of limitations and jurisdiction (see below) have not been addressed in the 2007 Reply and in case of a nuclear accident, the provisions of the 1986 Reply should supplement the 2007 Reply as necessary in order to avoid any legal void.

Nuclear Liability Principles

The Replies aim to reflect the main principles of the international conventions on nuclear third party liability but provide fewer details.

- **Definition of Operator**

Usually the international conventions define the key terms of nuclear third party liability such as “operator”, “nuclear incident”, “nuclear installation”, “nuclear fuel”, “nuclear material”, and “nuclear damage”. However, the 2007 Reply only provides for a definition of “Operator” as Chinese legal entities “that [operate] nuclear power stations, civil research reactors and/or civil engineering test reactors, or that are engaged in the production and transportation of civil nuclear fuel and the storage, transportation and reprocessing of spent fuel, and have nuclear installations, are considered operators of such nuclear power stations or nuclear installations”.

This definition does not specify, as in the 1986 Reply and the international conventions, that the Operator must be *designated* or *recognised* by a public authority.

China is a Party to the IAEA's 1994 Convention on Nuclear Safety and accordingly has set up a system of licensing with regard to nuclear installations, prohibiting the operation of a nuclear installation without a license. The Operating License shall be issued by the National Nuclear Safety Administration (the “NNSA”) in accordance with other nuclear regulations and the entity holding such Operating License should therefore be considered as the Operator under the 2007 Reply.

The 2007 Reply provides furthermore that:

- if an Operator operates several nuclear installations at one site, these nuclear installations shall be deemed as one single nuclear installation; and
- when two or more Operators are involved in a nuclear accident and their respective liability cannot be clearly determined, such Operators shall be jointly and severally liable for the damages.

- **Exclusive Liability**

According to the 2007 Reply, in case of a nuclear incident, the Operator is exclusively liable for nuclear damage, except if a nuclear accident directly results from armed conflict, hostile action, war or riot, in which case the relevant Operator shall not be liable to compensate for the related damages.

The 2007 Reply did not duplicate the additional exception in the 1986 Reply: a “grave natural disaster of an exceptional character”, which is also an exception to the Operator's exclusive liability under the international conventions.

On the other hand, the 2007 Reply clearly allows the Operator to have recourse against a third party, after compensating the victim, if:

- such recourse is provided in a written contract (i.e. with a supplier);
- the nuclear accident is due to a natural person's wilful act or omission, in which case the Operator shall have a recourse against such person.

Finally, the operator cannot be held liable under legal provisions other than the one governing the nuclear third party liability. This is not certain in China as neither Reply explicitly excludes such possibility nor should they technically prevail over laws which may



apply in case of a nuclear incident pursuant to the legal framework set up by the 2000 Legislation Law.

- **Strict Liability**

The 1986 Reply clearly stated that the Operator was *absolutely* liable for nuclear damage, i.e. it will be held liable for the nuclear damage suffered by third parties as a result of a nuclear accident at its installations or during the transportation of nuclear material to the installation when in the possession of the Operator, without the need to prove that the Operator was negligent or at fault. Even though the 2007 Reply is silent on this matter, it should be considered that the 1986 Reply supplements it as

	Liability Cap	State Indemnity
Operators of nuclear power stations, spent fuel storage, transportation and post-treatment	RMB 300 M (USD 44 M)	Above RMB 300 M up to RMB 800 M (USD 117.36 M)
Other operators	RMB 100 M (USD 14.67 M)	Above RMB 100 M up to RMB 800 M (USD 117.36 M)

If the damages to be indemnified exceed the above caps, the State Indemnity may be increased following appraisal by the State Council.

Even though these caps are still very low compared to the international standards, the increase has been very substantial for Chinese operators.

- **Limitation of liability by time and unity of jurisdiction**

The 2007 Reply does not provide for a limitation of liability in time nor determines which Chinese court has jurisdiction to deal with claims arising out of a nuclear incident. The 2000 Legislation Law clearly states that such matters can only be provided under a law, which explains why the 2007 Reply states that they shall be expressly provided for in the future Atomic Energy Law.

If a nuclear incident arises before the new Atomic Energy Law is enforced, the 1986 Reply will surely apply to these matters and therefore:

- the victims of a nuclear incident occurring in the territory of the PRC shall be entitled to claim compensation from the Operator within three years after the date when the victim has knowledge or should have had knowledge of the nuclear damage

China's position has always been to reflect the main international principles of nuclear liability.

- **Limitation of liability by amount**

The Operator shall be liable to compensate for personal casualties, property losses or environmental damages arising out of nuclear incidents.

The Operator's liability under the 2007 Reply is capped and if the total amount of compensation for the damages caused by the nuclear accident exceeds the cap, the State shall provide a financial indemnity as summarised in the table:

arising therefrom and no later than ten years after the date of occurrence of the nuclear incident; and

- only the People's Court which has jurisdiction over the place where the nuclear incident occurs in accordance with the PRC laws shall have jurisdiction to hear such claims.

- **Congruence of liability and coverage**

In line with the international principles, the 2007 Reply requires that the Operator:

- maintains "sufficient insurance" before the Operator starts operating the nuclear power station or carrying out storage, transportation or post-treatment of spent fuels activities; and
- provides "appropriate financial guarantees and arrangements" to ensure timely and effective payment of the amounts it shall be liable to pay to the victims in case of a nuclear incident.

Even though "*sufficient* insurance" and "*appropriate* financial guarantees and arrangements" are vague terms, the principle is for the Operator to maintain insurance or provide financial security covering its liability for nuclear damage in an amount at least equal to its liability cap under the 2007 Reply.



Tran border nuclear damage

In the midst of an ambitious nuclear program, instead of joining an international convention, China has taken a singular approach of addressing the issue of trans border nuclear damage by providing in the 2007 Reply that where a nuclear accident causes damages across the borders of the PRC, such damages shall be handled in accordance with the treaty or protocol between the PRC and the relevant country or, if there is no treaty or protocol, in accordance with the principle of reciprocity.

There is no explicit language under the Chinese law explaining the exact meaning of the principle of reciprocity; therefore, the principle set forth in the international legal system should apply, i.e. the favours, benefits or penalties that are granted by one State to the citizens or legal entities of another should be returned in kind.

In particular, it is not clear how the principle of reciprocity should be applied if the content of the foreign law is different from that of the 2007 Reply.

The future of nuclear liability in China

The current legal regime in China for nuclear third party liability is only temporary and reflects the continuous efforts of the Government to try and incorporate the main international principles of nuclear liability into legislation while trying to accommodate domestic companies' requirements. In order to achieve the nuclear expansion, a clear, detailed and fixed legal framework is necessary in the near future to provide legal visibility to all domestic and foreign companies participating in Chinese nuclear projects. Hopefully the future Atomic Energy Law, which is in the process of being finalised (a first draft was issued late 2007 in order to seeking opinions from the nuclear industry and public administrations), will bring such comfort when finally promulgated.

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