

Resolving India's Nuclear Liability Impasse

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Summary

India's Civil Liability for Nuclear Damage Act (CLNDA) has emerged as an appropriate template that could rekindle the nuclear energy sector while also safeguarding the public interest. The Act establishes a liability framework that makes all major participants in a nuclear power project accountable for its safe functioning, thus enhancing public confidence in nuclear energy. In the process, it also implicitly foregrounds the shortcomings in the CSC, which may be seen as outdated in the post-Fukushima era. Though suppliers have taken exception to the provisions that make them liable, they should appreciate the fact that the Rules notification has clarified the liability limits that could be enforced upon them even while making them accountable for their supplies. Further, foreign suppliers should wake up to the emergence of a new nuclear energy order wherein developing economies will shape the future of the nuclear energy sector, and invariably do so driven by their own interests.

Since its enactment in September 2010, India's Civil Liability for Nuclear Damage Act (CLNDA) has been a subject of intense debate and controversy.¹ Concerns over suppliers' liability stipulated in the Act have supposedly deterred both international and domestic suppliers from entering into contracts to supply reactors and components for upcoming nuclear power projects. Realising that the resultant impasse might derail its ambitious nuclear energy expansion plans, New Delhi has been considering various policy and legal options to resolve this issue. While the issue figured prominently during Prime Minister Narendra Modi's October visit to the US, his promise about addressing various outstanding issues and the importance of nuclear energy for India's energy security raised hopes of an early resolution of this impasse.²

Still, many observers doubt if any tangible solution or 'corrective action'³ could be easily worked out to the satisfaction of all parties concerned since a review of the legislation seems improbable. The attempt to finesse the suppliers' liability provisions through a rules notification has also not conclusively redressed prevailing concerns.⁴ Progressive efforts towards finding feasible solutions may hence entail some out-of-the-box thinking and exercising innovative policy options with a political resolve. Going by the current debate, it seems the supplier liability provisions have been unduly demonised without appreciating the government's obligation of having to safeguard the public interest before expanding the country's nuclear energy sector.

This essay, while examining some options and fresh approaches, also argues that Indian law provides a constructive template for civil nuclear liability that could emerge as a new best practice for the global nuclear industry.

India's liability law and supplier concerns

The need for a civil nuclear liability law has been long felt in the absence of an appropriate legal framework to establish liability and ensure swift compensation in the event of a

¹ Ministry of Law and Justice, "The Civil Liability for Nuclear Damage Act, 2010," *Government of India*, September 21, 2010, URL: [http://lawmin.nic.in/Id/regionallanguages/THE%20CIVIL%20LIABILITY%20OF%20NUCLEAR%20DAMAGE%20ACT, 2010.%20\(38%20OF%202010\).pdf](http://lawmin.nic.in/Id/regionallanguages/THE%20CIVIL%20LIABILITY%20OF%20NUCLEAR%20DAMAGE%20ACT, 2010.%20(38%20OF%202010).pdf)

² "Remarks by President Obama and Prime Minister Narendra Modi of India After Bilateral Meeting," *The White House Office of the Press Secretary*, September 30, 2014, URL: <http://www.whitehouse.gov/the-press-office/2014/09/30/remarks-president-obama-and-prime-minister-narendra-modi-india-after-bil>.

³ "Nuclear power investors need clarity on liability, says Anil Kakodkar," *The Economic Times*, October 15, 2014.

⁴ Department of Atomic Energy, "Civil Liability for Nuclear Damage Act Rules," Notification, November 11, 2011, URL: <http://www.prsindia.org/uploads/media/Nuclear%20Rules/Civil%20Liability%20for%20Nuclear%20Damage%20Rules%202011.pdf>.

nuclear accident. Furthermore, pursuant to the Indo-US nuclear cooperation agreement, India had supposedly avowed⁵ to adhere to the Convention on Supplementary Compensation for Nuclear Damage⁶ (CSC) that requires signatory states to legislate a compliant domestic liability law. Many hail the Indian law, passed by Parliament in September 2010, as a progressive piece of legislation since it not only addresses the need for a national legislation on civilian liability but also incorporates the industrial safety learning from the Bhopal Gas Tragedy of 1984.

The supplier community, however, perceives the Indian law as deviant from international legal instruments such as the CSC and the Vienna and Paris conventions. Though the CSC and other conventions hold suppliers liable through the operator's *right of recourse* (RoR), Section 17(b) of the CLNDA broadens the RoR conditions by stipulating that the operator shall have a *right of recourse* where "the nuclear incident has resulted as a consequence of an act of a supplier or his employee, which includes *supply of equipment or material with patent or latent defects or sub-standard services*." Further, Section 46 of the CLNDA states that this Act is in addition to other domestic laws in force, thereby allowing criminal liability and other tort claims.

These conditions have caused considerable unease among domestic and international suppliers. Not only has the supplier community rejected the claims of any apparent safety benefits that might accrue by holding them liable, but have also expressed their inability to participate in India's planned nuclear energy expansion under this liability framework.⁷ American suppliers have for long been insisting on India's early ratification of the CSC, which, they believe, would protect them from any liability since the US does not recognise RoR by a CSC signatory country against its suppliers⁸. Russian suppliers have also demanded an exemption from Indian law, based on the Intergovernmental Agreement (IGA) between India and Russia of December 5, 2008, which holds the operator fully responsible for any damage caused within and outside Indian Territory. Indian suppliers also have expressed reservations over the liability law and are reluctant to enter into contracts to supply components for the proposed Pressurized Heavy Water Reactor (PHWR) projects. Although the Indian government limited suppliers' liability (to value of contract or operator's liability) and the timeframe (initial license period or product

⁵ "US wants India to ratify CSC," *TNN*, June 22, 2011, URL: <http://timesofindia.indiatimes.com/india/US-wants-India-to-ratify-CSC/articleshow/8944797.cms>.

⁶ "Convention on supplementary compensation for nuclear damage," International Atomic Energy Agency, July 22, 1998, URL: <http://www.iaea.org/publications/documents/infcircs/convention-supplementary-compensation-nuclear-damage>.

⁷ "U.S.-India Business Council Statement on Nuclear Liability Law," *Reuters*, August 30, 2010, URL: <http://www.reuters.com/article/2010/08/31/idUS29327+31-Aug-2010+BW20100831>.

⁸ Jack Spencer, "Congress Must Implement CSC Treaty to Reinvigorate U.S. Nuclear Industry," The Heritage Foundation, October 9, 2007, URL: <http://www.heritage.org/research/reports/2007/10/congress-must-implement-csc-treaty-to-reinvigorate-us-nuclear-industry>

liability period) for exercising right of recourse through the *Civil Liability for Nuclear Damages Rules 2011*, suppliers fear the possibility of legal challenges and unforeseeable financial risks in the long run.

The ongoing stalemate could primarily be attributed to Section 17(b) of the CLNDA, which has a wider ambit than the two RoR clauses stipulated in Article 10 (Annex) of the CSC, namely: (a) the RoR should be expressly provided for by a contract in writing, and (b) if the nuclear incident results from an *act* (commission or omission) done with *intent* to cause damage. The intricacy about CLNDA is that it specifies through Section 17(b) the possible conditionalities (act) leading to the incident as including even *patent or latent defects in materials or equipment or sub-standard services*. Though suppliers perceive it as an onerous provision, this additional provision, when read together with other clauses in Section 17, only comes as a natural sequence wherein it is elaborated that RoR could be invoked after establishing the nature of the supplier's *act*, arising from his *intent to cause damage*.

The second issue is about the inconsistency of the Indian law with the CSC. Article 10 of the CSC specifies that the RoR can be applied *only* with two provisions: that it should be provided for in the contract and that intent to cause damage should be established. The emphasis on *only* could be seen as both an enabler as well as a limitation. On the one hand, it could imply that a RoR could be claimed *only* if it is expressly agreed to in a contract. But on the other hand, it could also imply that the RoR provisions in a national legislation should stick to the two provisions enshrined in the CSC. The Convention requires signatory nations to formulate national legislations to provide for a liability framework, which should be consistent with it. Irrespective of whether the CSC restricts signatory nations from including additional provisions in their domestic legislations, as done in the case of CLNDA, nations are expected to exercise due diligence in safeguarding their own public interests when formulating such legislations. Assuming that the CSC itself was an outcome of the initiative taken by a select group of nations, restricting the interpretative scope of a provision could be construed as benefiting the initiating parties rather than later adherents.

Third, suppliers are also apprehensive about potential legal challenges to the Act or Rules notification in Indian courts, especially since the Supreme Court has accepted a petition challenging the constitutional validity of CLNDA. Though it is unlikely that the Supreme Court will override a legislation passed by Parliament, the Court's interpretation might be crucial on the Rules notification. Some legal experts have opined that Rule 24(2) is *ultra vires* for scaling down the liability limits and timeline and hence could be inconsistent with Section 6 of CLNDA.⁹ However, Section 6 specifically provides for only *increasing* the maximum liability amount for compensation or even the operator liability and does not include any provision that could preclude the scope for scaling down the liability

⁹ Sandeep Dikshit, "Nuclear liability rules ultra vires," *The Hindu*, December 13, 2011.

amount or timeline for exercising RoR.¹⁰ Accordingly, Section 6 allows the government to review the operator's liability from time to time and specify a higher amount, besides taking additional measures to enhance the maximum amount of liability.

Much of the concern highlighted by suppliers and critics of the CLNDA thus seems to emerge from different interpretations on how the law might be practised and their conceptions of varied (and often extreme) scenarios of a potential nuclear incident and subsequent application of RoR. Such conceptions are natural when a new legal instrument is assessed. Equally significant, though, is the imperative of lawmakers formulating sufficient provisions to address all possible eventualities. While diluting the legal instrument may not be an ideal solution to address such interpretational divergences, there remains abundant scope to establish mutually-acceptable procedures and measures that could improve the operator-supplier relationship and mitigate prevailing concerns over the liability law.

Solutions to the liability impasse

Several options could be considered within the CLNDA framework to resolve the current stalemate. First, both the CLNDA and the CSC make it abundantly clear that the RoR should be expressly provided for in a written *contract*. As the primary instrument to determine the framework for transactions between the operator and supplier, the contract could be suitably drafted in a manner that satisfies both parties while being consistent with the principles of various laws. In other words, the time and resource limits to the supplier's liability, actual conditions under which RoR will be invoked and other functional pre-requisites could be incorporated into the contract to mutual satisfaction. In fact, the CLNDA does not carry any provision to restrict such flexibility in drafting contracts. Furthermore, some jurists have opined that Section 17(a) allows the operator to decide whether RoR provision should be incorporated in a particular contract or not.¹¹ Though such interpretational flexibility could be used to formulate supplier-friendly contracts, forfeiting the RoR or leaving suppliers completely unaccountable may not be a healthy practice.

The second aspect is the importance of the provision in CLNDA and CSC of *intent* to cause damage, which implies that such intention should be proven to invoke the RoR. While Section 17(b) expands the conditionality to include equipment, materials or services, this clause sufficiently suggests that such resources should be *proven* as 'sub-standard' or with 'latent or patent defects'. When read with Section 17(c), this clause inherently entails

¹⁰ Considering that the contract value of supplies could vary from case to case, it would have been imprudent to fix a supplier liability through RoR at a higher amount than the contract value or even the operator's liability. The Rules notification hence sensibly caps it at either the operator liability or a lesser contract value. See 24(1) of Rules notification, n.4.

¹¹ Sandeep Dikshit and J. Venkatesan, "Manmohan may carry nuclear liability dilution as gift for US companies," *The Hindu*, September 19, 2013.

that the operator should not only prove that the resource in question is *cause* for the incident in order to substantiate the *act* but also the *intent* to cause damage. The ongoing debate has not explored the parameters that an operator could use to either determine the *causalactor* to prove the *intent* to cause damage. In fact, proving intent may not just be a meticulous task, but also needs to stand legal scrutiny. When seen holistically, it may seem that the burden of substantiating intent will in itself make the pursuit of RoR a difficult endeavour. A prudent measure, hence, will be to negotiate such assessment frameworks with the suppliers so as to provide them with assurance against any prejudicial litigation, even while securing their commitment to better quality standards.

The third option is the related imperative of instilling some collaborative ethos to redress the lingering mistrust in the operator-supplier relationship. Contrary to the spirit of nuclear cooperation envisaged between India and other supplier countries, the ongoing contractual engagements seem to have given little space for collaborative structures, like a joint assessment mechanism for quality assurance or for early detection of product or design defects. Though this could innately enhance stakes in each other's functional domains, two aspects seemingly hinder such collaboration: (a) the complexities of quality assurance vis-à-vis untested reactors or trademark equipment in which the operator has no technical stake, and (b) the possibility of an operator certification being misused by the supplier to escape liability.

Both hindrances, though, could be overcome with some flexibility by both parties. The supplier should by all means be obligated to provide for safety and quality guarantees for the reactor or equipment for a particular period (product liability/guarantee period), ideally concurrent with the contractual timeline or license period, whichever suits both parties. Similarly, the operator could certify its *confidence* on the quality of equipment for a particular timeline, with the contractual qualification that such certification may not mitigate its RoR if an act with intent to cause damage is proven in the event of a nuclear accident. Neither the CSC nor CLNDA forbids the scope of any such joint mechanisms, which could go a long way in building a durable operator-supplier relationship.

Fourth is the aspect of indemnification and insurance which remains a bone of contention. Section 8(1) of CLNDA mandates operators to take an insurance policy or such other 'financial security' (indemnity or guarantees) to cover his liability. This normally implies that the operator could insure for all aspects of the nuclear project to which he is liable or take suitable financial measures to cushion him from bankruptcy. Similarly, Article 2(2) of CSC requires the national law to indemnify "any person other than the operator liable...to the extent that person is legally liable to provide compensation." While this clause largely encourages the contracting party (installation state) to provide for an insurance or funds pool (Nuclear Liability Fund as suggested in Section 7(2) of CLNDA),¹² western analysts

¹² This Fund is intended to cater for the government's compensation beyond the operator's liability. Further, Section 8 clarifies that provisions for financial security is for the operator to cover his liability and shall not apply to a government-owned nuclear installation.

have sought to project this clause as implying the indemnification of suppliers from all claims.¹³ Some Indian experts have also pointed to similar instances of foreign suppliers being indemnified for the Tarapur and Rajasthan atomic power projects.¹⁴

Nonetheless, the nuclear establishment is known to be open to such indemnification through an Indian insurance pool although foreign suppliers are known to favour international underwriters.¹⁵ However, a more significant issue, which seems to have been overlooked in the process, is the *raison d'être* of RoR once suppliers are indemnified from claims. Unlike the early years of the nuclear programme, when the CSC and RoR principle were absent, India's liability law now stands out as an ideal legal template for the post-Fukushima era by attempting to instil the accountability of suppliers through the RoR. However, some sections argue that suppliers could be encouraged to do business only by being indemnified from liability.¹⁶ While any step to improve the operator-supplier relationship could be welcomed for the expansion of the nuclear energy sector, the sanctity of RoR needs to be ensured in order to make the supplier accountable to the project's safe and productive functioning.

Finally, there have been demands for amending the CLNDA by diluting the RoR provisions or matching it with the CSC template.¹⁷ Given the public sentiment over the Bhopal Gas Tragedy, which influenced the parliamentary debate on civil nuclear liability, it is unlikely that the present BJP-led government will amend the law in its present form. Further, the BJP, as the main opposition party, was then at the forefront demanding stringent provisions to protect the public interest. Any attempt, hence, to amend the Act will tantamount to disregarding the democratic process as well as political double standards. Instead, the government could consider the possibility of a fresh Rules notification that incorporates suitable solutions and redresses the existing interpretational gaps.

¹³ Interview of Ashley J. Tellis by Jayshree Bajoria, "India's Nuclear Liability Dilemma", *Council for Foreign Relations*, November 4, 2010, URL: <http://www.cfr.org/world/indias-nuclear-liability-dilemma/p23305>.

¹⁴ M.R. Srinivasan, "A liability for our nuclear plans," *The Hindu*, October 15, 2012.

¹⁵ Indrani Bagchi, "India gives US insurance plan for nuclear plants", *TNN*, March 13, 2014.

¹⁶ Indemnification may affect or favour differently for suppliers engaging in large-scale (reactor) contracts and those supplying smaller components and materials. Assuming that the value of a reactor contract is Rs 5000 crore, the RoR can only be for the operator's liability of Rs 1500 crore, unless the government raises it to a higher amount. Likewise, if a small-scale supplier has a contract worth around Rs 200 crore then that becomes the RoR claim being the lesser amount. While insurance for a large-scale supplier could be pursued as a stand-alone arrangement, providing for insurance coverage to a plethora of small-scale suppliers might be a difficult endeavour. The concerns of domestic small-scale suppliers could be appreciated in this context.

¹⁷ Indrani Bagchi, "India gives US insurance plan for nuclear plants", *TNN*, March 13, 2014, URL: <http://timesofindia.indiatimes.com/india/India-gives-US-insurance-plan-for-nuclear-plants/articleshow/31915081.cms>.

Indian law as a best practice

Notwithstanding the fervent criticism from various quarters, the Indian law has emerged as an appropriate template that could rekindle the nuclear energy sector while also safeguarding the public interest. The Act establishes a liability framework that makes all major participants in a nuclear power project accountable for its safe functioning, thus enhancing public confidence in nuclear energy. In the process, it also implicitly foregrounds the shortcomings in the CSC, which may be seen as outdated in the post-Fukushima era.¹⁸ Though suppliers have taken exception to the provisions that make them liable, they should appreciate the fact that the Rules notification has clarified the liability limits that could be enforced upon them even while making them accountable for their supplies. Further, foreign suppliers should wake up to the emergence of a new nuclear energy order wherein developing economies will shape the future of the nuclear energy sector, and invariably do so driven by their own interests.

It is also encouraging that many countries, including Japan,¹⁹ are now coming around to appreciate the Indian law, its innate ethos of public interest and its spirit of promoting a culture of safe nuclear energy. In fact, progressive societies might find the Indian law an imitable best practice when they review the future utility of nuclear energy. This may hold relevant for many Asian and European countries that have discarded nuclear energy following the Fukushima incident. A credible nuclear liability law, on the lines of the CLNDA, will be a suitable model to retain confidence of the public in nuclear energy and reinstate it as a sustainable energy source for the future.

¹⁸ The limited adherence to the CSC and the low number of ratifications may be testaments to this. See "Latest Status: Convention on Supplementary Compensation for Nuclear Damage," IAEA, July 7, 2014, URL: http://www.iaea.org/sites/default/files/supcomp_status.pdf.

¹⁹ Sandeep Dixit, "Japan may amend its nuclear damage compensation Act," *The Hindu*, March 5, 2013.