



REVISITING INDIA'S NUCLEAR LIABILITY ACT

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While the Russian-built Kudankulam nuclear plant in Tamil Nadu is now generating electricity, India's ambitious nuclear energy plan seems to be suffering from contention over India's Civil Liability for Nuclear Damage Act (2010). Recently, Prime Minister Manmohan Singh's visit to Russia did not include signing of agreement on two additional nuclear reactors (units 3 & 4) for the Kudankulam Nuclear Power Project (KNPP).ⁱ A similar delay occurred in the signing of a preliminary contract between Nuclear Power Corporation India Limited (NPCIL) and Westinghouse of the US in September 2013.ⁱⁱ Both cases involved the Civil Liability for Nuclear Damage Act.

India's Civil Liability for Nuclear Damage Act (2010) is currently under serious consideration by various domestic and external stakeholders. Discord has characterised opinions on the 'right of recourse' in clause 17 of the law. Many in the nuclear energy industry have criticised the law for preventing India from undertaking vigorous nuclear trade. However, opinions on the issue also incorporate political divisions. Opposition parties have remarked that bypassing an operator's right to recourse amounts to an illegal attempt by the government, while anti-nuclear groups describe the law as the incumbent government's gift to U.S. nuclear companies.ⁱⁱⁱ

In principle, India's nuclear liability act aims to provide a scope and range of civil liability for nuclear damage and compensation, which is understood as a last step to complete an Indo-US civil nuclear agreement. However, since the nuclear liability bill was enacted, all existing commercial contracts are at a standstill as many agree that the liability

act seems to have deterred these countries, probably temporarily, from proceeding towards any tangible trade negotiations.

The most debated section of India's liability law is contained within clause 17, where the operator is bestowed with the 'right of recourse' if: "(a) such right is expressly provided for in a contract in writing; (b) the nuclear incident has resulted as a consequence of an act of [the] supplier or his employee, which includes supply of equipment or material with patent or latent defects or sub-standard services; (c) the nuclear incident has resulted from the act of commission or omission of an individual done with the intent to cause nuclear damage".^{iv} The bone of contention, however, is in the sub-clauses (a) and (b), which state that an operator is free to waive its right of recourse against a supplier of the contract if it desires to do so.

According to Attorney General Goolam Vahanvati, "Section 17 (a) provides for recourse if such right is expressly provided for in a contract in writing. If the operator chooses not to incorporate such a provision in the contract, *it would be open for him to do so.*"^v This is justified by linking the sub-clauses (a) and (b), and thereby the provisions for recourse afforded to the operator, gravitating its right of recourse towards the contract under clause 17 (a) and thereby nullifying the provision of the sub-clause (b).

During the early years of the country's nuclear infrastructure development, India provided indemnity protection to nuclear suppliers on several occasions. For instance, GE received indemnity protection for the Tarapur plant; Canada received it for the Rawatbhatta plant; and Russia received it for the Kudankulam plant. However, the recent reframing of the liability law has been heavily influenced by the events surrounding the recent tragedy in Bhopal, which was initiated by a gas leak. Investigators of the gas leak were not able to determine what caused water to seep into the MIC tank and set off that gas leak. In terms of nuclear plants, pinpointing the cause of an accident would be even more complex, as thousands of vendors supply numerous components of a given reactor. Operators often incorporate many modifications to these components at their discretion, in order to improve a reactor's reliability during construction and operation, its ease of

operation, and its efficiency. Hence, suppliers say it would be difficult to provide coverage for large, persistent risks that they have limited control over.

In particular, the apprehension comes from the foreign vendors. Russia, for one, has refused to bring Kudankulam's 3 and 4 unit reactors under the law saying that inter-government treaty for KNPP was signed prior to the enactment of the law. Canada, India's oldest civil nuclear partner, remains concerned about the provisions of the liability law. French companies are equally concerned and show unease about the stringency of the law, while expressing that they would abide by Indian law by definition while consulting nuclear safety elements and other technical considerations at Jaitapur. In comparison, U.S. companies are more concerned about clauses 17 and 46, and fear that this could bring unlimited liability upon them. Despite the fact that the Early Works Agreement (EWA) has left the 'right of recourse' clause to be decided at a later stage, agreement over the law may not arise easily. Reportedly, the maximum price per megawatt from the Westinghouse reactor is Rs 38.76 crore, which works out to be Rs 12.19 per kilowatt for the consumer. This is much higher than the reported negotiated price with Russia (without liability), which is about Rs 22 crore per MW (or about Rs 6 per kilowatt for the consumer).^{vi} Hence, how the law will impact the fixing of the final cost of the reactors and the subsequent per-unit cost of electricity remains a matter of speculation.

India's domestic companies are dissatisfied as well facing the uncertainty that impacts on 200 Indian firms supplying various components of nuclear reactor. In fact, for the last three years, Indian companies like Walchand, L&T, BHEL, and Godrej & Boyce have been expressing their apprehensions to the nuclear establishment.^{vii} Despite that the entire idea of liability is to bring India's nuclear governance structure into the Act, various rules and regulations stemming from the law give little space to compromise.

The question remains as to how to best reconcile the competing interests of various stakeholders. Indian government tries to attract the global nuclear industry to achieve a 14,600 MWe nuclear capacity by 2020, and 27,500 MWe by 2032. Meeting these policy goals depends on how smoothly future nuclear projects are planned and accomplished. Compromising on safety in order to realise India's nuclear goals is not advisable. However,

a pragmatic legal regime that takes into account global realities and national interests must be devised. Since all nuclear energy exporters are attracted to India, India needs to find innovative ways to ride the global nuclear energy trend and smoothly bring the nuclear energy renaissance of the twenty-first century home.

(Disclaimer: The views and opinions expressed in this article are those of the author and do not necessarily reflect the position of the Centre for Air Power Studies CAPS)

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ⁱ "Time to begin the repair work", *The Hindustan Times*, 23 October 2013, p. 8.

ⁱⁱ "Anjana Pasricha, "India's nuclear liability law slows power plan rollouts", *Voice of America*, 25 October 2013. [Online: web] Accessed on 4 November 2013. <http://www.voanews.com/content/india-nuclear-liability-law-slows-power-plant-rollouts/1776692.html>

ⁱⁱⁱ "Govt will commit illegal act by succumbing to US on N-deal", *Rediff*, 19 September 2013, [Online:web] Accessed on 4 November 2013. <http://www.rediff.com/news/report/govt-will-commit-illegal-act-by-succumbing-to-us-on-n-deal/20130919.htm>

^{iv} Ministry of Law and Justice (Legislative Department), *The Civil Liability for Nuclear Damage Act, 2010*, 22 September, 2010 p. 8

^v J. Venkatesan, "Opinion on liability waiver based on legality, says AG", *The Hindu*, 22 September, 2013. [Online: web] Accessed on 4 November 2013. <http://www.thehindu.com/news/national/opinion-on-liability-waiver-based-on-legality-says-ag/article5154648.ece>

^{vi} Pranab Dhal Samanta, "India's n-trade dilemma: US power rate twice that of Russia" *The Indian Express*, 19 September 2013, [Online: web] Accessed on 29 November 2013. <http://m.indianexpress.com/news/indias-ntrade-dilemma-us-power-rate-twice-that-of-russia/1171099/>

^{vii} Indrani Bagchi, "Now, domestic nuclear industry too protests against liability law", *The Times of India*, 7 October 2013, [Online: web] Accessed on 4 November 2013. http://articles.timesofindia.indiatimes.com/2013-10-07/india/42793863_1_npcil-liability-law-nuclear-power-corporation