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TEST OF INDIA'S NUCLEAR LIABILITY LAW: CIVIL LIABILITY FOR NUCLEAR DAMAGES ACT, 2010

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INTRODUCTION

Nuclear liability laws are a set of regulations that govern the financial responsibility of nuclear operators in the event of a nuclear accident. These laws vary from country to country, but they typically include provisions for compensation to victims of nuclear accidents, as well as for the clean-up of contaminated sites.

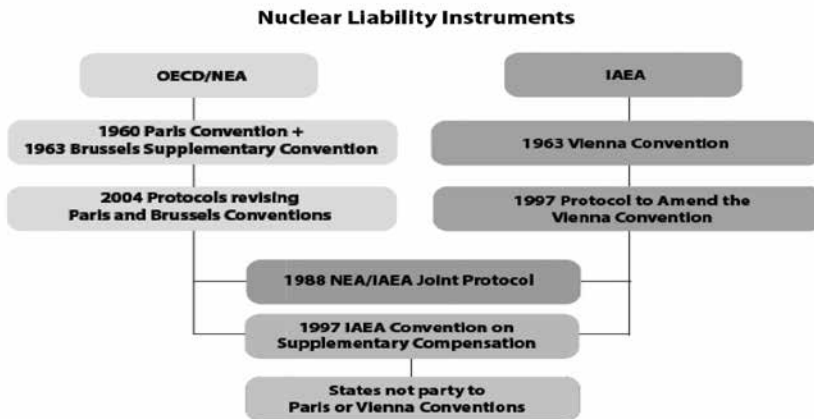
For many years, international nuclear law jurisprudence has taken the undisputed basis of directing all liability to the nuclear power plant operator and excluding the supplier's liability. This idea is followed by nearly all nations pursuing nuclear energy, and as time passed, it was also incorporated into the domestic laws of nuclear liability of countries that required the enactment of such legislation. This nuclear liability principle has not been challenged, and it had been codified in the Third-Party Liability Convention in the Nuclear Energy Field (1960), the Vienna Convention on Civil Liability for Nuclear Damage (1977, as amended), and the Convention on Supplementary Compensation for Nuclear Damages (1977).

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In India's case, being a nuclear state, it opted for the Convention on Supplementary Compensation (CSC) for Nuclear Damages. As part of ratifying the CSC, the Indian Parliament passed the Civil Liability for Nuclear Damages Act, 2010 (CLNDA). Thus, the supplier's liability principle was introduced. Under CLNDA, the operator would be primarily liable for a nuclear accident and would be forced to pay compensation. However, the legislation had created for the first time a new liability concept (new in the nuclear liability law area) for suppliers, in addition to the accepted operator liability concepts.¹

Ever since its enactment, CLNDA has posed several challenges and has acted as a major obstacle between India and its nuclear energy ambitions. This paper aims to study the legal framework surrounding liability laws. It will cover the areas concerning damage caused by the peaceful use of nuclear energy at the national and international levels, with a particular focus on India's liability law. The focus will also be on how India got its nuclear liability laws and how this has been a challenge to India's nuclear sector in many ways.

Fig 1: Nuclear Damages Liability: International Overview



Source: International Atomic Energy Agency.²

1. Gorremutchu Mahith Vidyasagar, "India's Nuclear Civil Liability Act: A Paradigm Shift from International Nuclear Civil Liability Regime", *International Journal of Law Management and Humanities*, vol. 4, no. 3, 2021, p. 4.
2. ISSUE BRIEF: "Legal Framework on Civil Liability for Nuclear Damage", International Atomic Energy Agency, September 2022, available at <https://www.iaea.org/sites/default/>

The field of nuclear energy, along with its development over the years, has also witnessed nuclear tragedies such as Chernobyl in 1986, Three Mile Island in 1979, and Fukushima Daiichi in 2011. However, given the role energy plays in the developing world era, nations acknowledged early the potential for trans-boundary nuclear damage which necessitated an international nuclear liability regime. International nuclear liability conventions are required to enable the initiation of legal actions and the enforcement of judgments without encountering obstacles from national legal systems.³

The Vienna Convention on Civil Liability, aimed to balance the national laws of the contracting parties by establishing a minimum standard to offer financial security against the damage caused by a nuclear accident, particularly with regard to the peaceful use of nuclear energy.⁴ Similarly, the Paris Convention established the 'Third Party Liability', aimed at providing adequate compensation to the victims of a nuclear accident and ensured that the nuclear energy sector flourished without any obstacles in its way. The convention provided for 'strict, no-fault liability of the operator'.⁵ Both the Vienna and Paris Conventions provide comprehensive and nearly comparable rules for civil liability for nuclear damage. Then we have the Brussels Supplementary Convention. This convention's goal is to provide for further compensation from national and international public money in circumstances where the Paris Convention's compensation is insufficient to cover all the damages.⁶

files/20/09/legal-framework-on-civil-liability-for-nuclear-damage.pdf. Accessed on July 27 2023.

3. "Nuclear Liability Conventions", International Atomic Energy Agency, <https://www.iaea.org/topics/nuclear-liability-conventions>. Accessed on July 17, 2023.
4. "Vienna Convention on Civil Liability for Nuclear Damage", International Atomic Energy Agency, <https://www.iaea.org/topics/nuclear-liability-conventions/vienna-convention-on-civil-liability-for-nuclear-damage>. Accessed on August 2, 2023.
5. "Paris Convention on Third Party Liability in the Field of Nuclear Energy", Nuclear Energy Agency, https://www.oecd-nea.org/jcms/pl_20196/paris-convention-on-third-party-liability-in-the-field-of-nuclear-energy-paris-convention-or-pc. Accessed on August 5, 2023.
6. "Brussels Convention Supplementary to the Paris Convention on Third Party Liability in the Field of Nuclear Energy", Nuclear Energy, https://www.oecd-nea.org/jcms/pl_20318/brussels-convention-supplementary-to-the-paris-convention-on-third-party-liability-in-the-field-of-nuclear-energy-brussels-supplementary-convention-or-bsc. Accessed on August 4, 2023.

A country must be a party to either the Vienna Convention on Civil Liability for Nuclear Damage of 1963 ("Vienna Convention") or the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960 ("Paris Convention") to be a party to the CSC.

On September 12, 1997, the Convention on Supplementary Compensation for Nuclear Damage ("CSC") came into being. A country must be a party to either the Vienna Convention on Civil Liability for Nuclear Damage of 1963 ("Vienna Convention") or the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960 ("Paris Convention") to be a party to the CSC. If a country is not a party to the aforementioned conventions, it may become a party to the CSC only if it states

that it possesses national nuclear liability legislation that complies with the provisions of the Annex to the CSC.⁷

However, the contracting parties to the Paris Convention are not parties to the Vienna Convention, and vice versa. The absence of an inter-relationship between the parties of the two conventions affects the scope of the two conventions. Implementing the regimes outlined would create difficulties in their geographical reach and also, the compensation for damage suffered by a non-signatory to the regime may not be obligatory. Additionally, challenges arise concerning the determination of the operator's liability. As both conventions differentiate between transport between contracting parties and transport between a contracting party and a non-contracting state, deciding which state's courts hold jurisdiction in transport cases also becomes a complex decision to make.

To avert problems such as these, there is the "Joint Protocol, relating to the application of the Paris Convention and Vienna Convention". The aim of the Joint Protocol is to establish treaty relations among signatories of both conventions. This approach assists in mitigating conflicts that might

7. "Convention on Supplementary Compensation for Nuclear Damage", International Atomic Energy Agency, <https://www.iaea.org/topics/nuclear-liability-conventions/convention-supplementary-compensation-nuclear-damage>. Accessed on July 23, 2023.

emerge when both conventions are applied simultaneously to a single nuclear incident. The Joint Protocol is exclusively accessible to states that are signatories of either the Vienna Convention or the Paris Convention.⁸

The above-mentioned conventions also came up with certain “basic principles” that formed a crucial part of the liability regime followed by different nations. These principles as laid out by the conventions are as follows:

- The liability of the operator is exclusive. It means that no other person, apart from the operator, is made liable for the nuclear damage.
- Strict liability is imposed on the operator, i.e., the liability is on the operator’s shoulders regardless of any fault on his part. This is also known as ‘no fault liability’.
- The amount of liability will be minimum, and as decided by the state. However, it should not be below a certain amount, which will depend upon the treaty being applied.
- It is mandatory that the liability of the operator is covered by insurance or any other financial security, which makes sure that the funds are made available to compensate the victims.
- There is exclusive jurisdiction of one state’s courts, usually the state where the disaster happens, so that the victims of the nuclear damage do not have to file compensation claims in several forums.⁹

Many countries around the world that were operating nuclear reactors, came up with their own legislation, in accordance with the International Atomic Energy Agency (IAEA) framework. The U.S. Price-Anderson

Many countries around the world that were operating nuclear reactors, came up with their own legislation, in accordance with the International Atomic Energy Agency (IAEA) framework.

8. “Joint Protocol Relating to Application of Vienna Convention and Paris Convention”, International Atomic Energy Agency, <https://www.iaea.org/topics/nuclear-liability-conventions/joint-protocol-relating-to-application-of-vienna-convention-and-paris-convention>. Accessed on July 29, 2023.

9. n. 2.

Act, 1957, German Atomic Energy Act (1959), Swiss Federal Law on the Exploitation of Nuclear Energy for Peaceful Purposes and Protection from Radiation (1959) and Japanese Law on the Compensation of Nuclear Damage (1961) are some of these.¹⁰

It is noteworthy to observe that in terms of nuclear liability legislation, a consensus emerged among almost all the nuclear states around a common principle, which entailed imposing strict and no-fault liability on nuclear power plant operators. In relation to the liability laws enacted by various nuclear states, similarities among them can be discerned.¹¹

INDIA'S NUCLEAR ENERGY NEED AND HOW INDIA GOT ITS NUCLEAR LIABILITY LAWS

India's fuel situation, marked by a scarcity of fossil fuels, has spurred increased investments in nuclear power for electricity generation. This drive aims to achieve the goal of a 25 per cent nuclear contribution by 2050, necessitating an anticipated 1,094 Gigawatt Electric (GWe) base-load capacity. In India, the establishment of civil nuclear power has a robust history. Starting from the 1960s, the construction of two small boiling water reactors took place at Tarapur. The nation's civil nuclear strategy has been geared towards achieving self-sufficiency across the nuclear fuel cycle.¹²

REGULATOR IN INDIA

The Atomic Energy Act of 1962 (referred to as the '1962 Act' hereafter) played a significant role in establishing and regulating India's nuclear energy regime. While its main aim has been to foster the growth of atomic energy, the regulatory aspect of the '1962 Act' extends comprehensively. It encompasses various activities associated with, or connected to, radioactive

10. "Civil Liability for Nuclear Damage Act, 2010 – A Primer for the British Nuclear Industries", Centre for Study of Science, Technology and Policy, https://cstep.in/drupal/sites/default/files/2019-01/CSSTEP_RR_Civil_Liability_for_Nuclear_Damage_Act_2010_2014.pdf. Accessed on July 28, 2023.

11. Vidyasagar, n. 1.

12. "Nuclear Power in India", World Nuclear Association, updated June 2023, <https://www.world-nuclear.org/information-library/country-profiles/countries-g-n/india.aspx>. Accessed on August 1, 2023.

substances. In simpler terms, any substance, whether it is a material or a mineral, meeting the criteria of a radioactive substance, falls within the purview of this legislation.

The Atomic Energy Act of 1948, which was enacted shortly following India's attainment of independence, emerged as a precursor to the 1962 Act. This also underscores the fervour and determination exhibited by the immediate political leadership of post-independence India in positioning nuclear energy generation and utilisation. The establishment of the Atomic Energy Commission (AEC) was prescribed under the 1948 legislation. Subsequently, in 1954, the Department of Atomic Energy came into existence. The 1962 Act took precedence over the 1948 Act. This enactment effectively mandated the "promotion, regulation, and utilization of atomic energy for the betterment of the Indian populace and for other peaceful objectives, as well as associated matters." The Act became effective on September 15, 1962.¹³

INTERNATIONAL COOPERATION FOR NUCLEAR ENERGY AND CHALLENGES THAT SURFACED

India's journey to establish a nuclear liability law began to unfold in 2008 when India and the United States signed a civil nuclear cooperation agreement ("Indo-US Nuclear Deal"). The Nuclear Suppliers' Group (NSG) granted India a unique arrangement, allowing its participation in international nuclear trade and commerce. Subsequent to this breakthrough, various countries expressed interest in nuclear trade with India.¹⁴

During the period when India and the US were negotiating their nuclear deal, the general public and legal community of India recognised the necessity of having legislation in place to safeguard their rights, expedite trials, and provide compensation in the event of a hazard. This concern was rooted in

13. Preethi Mokshagundam, "Is Indian Nuclear Law in Conformity with the Constitutional and International Law?", Social Science Research Network, June 18, 2015, https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2620138_code2352183.pdf?abstractid=2620138. Accessed on July 20, 2023.

14. Jayshree Badoria and Esther Pan, "The US -India Nuclear Deal", Council on Foreign Relations, November 5, 2010, <https://www.cfr.org/backgrounder/us-india-nuclear-deal>. Accessed on July 29, 2023.

the aftermath of the Bhopal gas tragedy, prompting a deliberate effort to establish appropriate legal mechanisms. Consequently, in 2005, India and the U.S entered into a nuclear cooperation agreement, and India affirmed its commitment to the Convention of Supplementary Compensation.

On September 21, 2010, India enacted the Civil Liability for Nuclear Damage Act, 2010 (CLNDA), and on October 29, 2010, it acceded to the Convention on Supplementary Compensation (CSC). India's instrument of ratification to the International Atomic Energy Agency was deposited on February 5, 2016, leading to the entry into force of the CSC for India on May 4, 2016. The enactment of CLNDA has been seen as a significant step forward, as it underscores accountability by providing compensation to the victims in the event of a nuclear incident. The enactment of CLNDA in 2010 was a direct result of India's adherence to the CSC. The CSC aims to establish a minimum compensation amount at the national level for each ratifying state and to subsequently augment this amount with the help of public funds, which contracting parties make available in cases where the national amount falls short in compensating nuclear damage victims.

On October 1, 2008, the US granted its final approval for the Indo-US nuclear deal, a significant development that ended three decades of US isolation on nuclear trade with India. In 2010, two years after the deal's finalisation, India allocated two sites to US companies for the construction of nuclear reactors. However, the liability law in India posed a challenge to the progress of the deal.¹⁵

In Articles 2-4 of the Indo-US agreement, India is granted the right to utilise nuclear materials present within its borders that do not fall under the scope of the Indo-US nuclear deal. One of the notable criticisms directed at the agreement concerned its imbalanced liabilities. The liability framework outlined in the Price Anderson Act within the United States amounts to US\$ 12.5 billion (approximately Rs. 50,000 crore), whereas the liability designated in India stands at Rs. 2,142 crore, making it 23 times greater than the established liability for an Indian operator. This discrepancy led to a breach

15. Ibid.

of Article 14 of the Indian Constitution, which pertains to the fundamental 'right to equality'. Overcoming various challenges, CLNDA (Civil Liability for Nuclear Damage Act) was ratified in 2010, ultimately facilitating the operationalisation of the Indo-US deal.¹⁶

In a similar vein, India has entered into a Memorandum of Understanding (MoU) with France. This agreement focusses on the endeavour to build six nuclear power reactors situated in the Jaitapur district of Maharashtra. This project is recognised as the largest power generation facility globally, as per its scope. The MoU was officially signed in the year 2008.¹⁷

The location designated for this had obtained environmental clearance and had also secured coastal zone clearances. The process of acquiring the necessary land was successfully concluded in the year 2018.¹⁸ Areva S.A., a French multinational group specialising in nuclear power, had aimed to secure export credit financing and finalise a contract by the conclusion of 2012. The intended time-line included the commissioning of the initial two units in the years 2020 and 2021. Subsequently, in 2013, negotiations persisted, and the government expressed its anticipation that the cost of the first two units would amount to Rs 120,000 crore (\$20 billion). Areva communicated in May 2015 that the commencement of construction might transpire within a span of two years, encompassing 50 per cent locally sourced components for the initial units. However, the viability of this time-frame hinged upon the resolution of nuclear liability concerns. The Nuclear Power Corporation of India Limited (NPCIL) submitted a request for an extension of its five-year environmental approval, which had lapsed in November 2015.¹⁹

16. Dr Pijush Sarkar, "Civil Nuclear Liability in India: An Assessment of Judicial Interpretation", https://www.academia.edu/33456292/CIVIL_NUCLEAR_LIABILITY_IN_INDIA_AN_ASSESSMENT_OF_THE_JUDICIAL_INTERVENTION. Accessed on July 25 2023.

17. Suhasini Haider, "Nuclear Liability Issues not yet Resolved for Jaitapur Project", *The Hindu*, April 24, 2023, <https://www.thehindu.com/news/national/nuclear-liability-issues-not-yet-resolved-for-jaitapur-project-french-company-edf/article66774668.ece>. Accessed on July 31, 2023.

18. "Jaitapur Site", Nuclear Power Corporation of India Limited, https://www.npcil.nic.in/content/507_1_JaitapurSite.aspx. Accessed on July 25, 2023.

19. "Nuclear Power in India", World Nuclear Association, updated June 2023, <https://www.world-nuclear.org/information-library/country-profiles/countries-g-n/india.aspx>. Accessed on August 1, 2023.

The Damages Act is designed to ensure the prompt and equitable provision of compensation to individuals affected by a nuclear incident, thus, contributing to the cultivation of public trust in the peaceful application of nuclear energy.

In 2023, both countries initiated a partnership focussing on Small Modular Reactors (SMRs) and Advanced Modular Reactors (AMRs), while concurrently maintaining their collaborative efforts in the realm of nuclear energy initiatives such as the Jaitapur Nuclear Power Project (JNPP) in Maharashtra and the Jules Horowitz Research Reactor (JHR) situated in Cadarache, France. However, the unresolved liability concerns continue

to pose a hindrance on international collaborations towards the nuclear energy sector in India. The Damages Act is designed to ensure the prompt and equitable provision of compensation to individuals affected by a nuclear incident, thus, contributing to the cultivation of public trust in the peaceful application of nuclear energy.²⁰

Within the framework of the Indo-France deal, officials from the contracting company Electricite de France (EDF) believe that India must revise the liability clauses in CLNDA. This alteration is deemed essential for India to establish contracts with other countries and effectively pursue its nuclear energy ambitions.²¹

UNDERSTANDING IMPORTANT SECTIONS FROM CLNDA 2010

There are 7 Chapters and 49 Sections in CLNDA 2010. Some important sections that form the liability law of India, CLNDA 2010, are as follows:

Section 4: Liability of the Operator

This provides for “absolute and no-fault liability of the operator”, as mentioned in Section 4 of the Act. No matter what the cause of the accident

20. “France, India Expand Cooperation to Include SMR’s”, *World Nuclear News*, July 17, 2023, <https://www.world-nuclear-news.org/Articles/France,-India-expand-cooperation-to-include-SMRs>. Accessed on August 3, 2023.

21. Haider, n. 17.

is and whoever is held guilty, the ultimate accountability of the incident and liability of the Act falls on the operator.

Section 6: Limits of Liability

Liability concerning the operator. This section provides that “the maximum amount of liability in respect of each nuclear incident shall be rupees equivalent to 300 million special drawing rights or as prescribed by the central government”. Moreover, the section delves into distinguishing between types of power plants and the amount of liability associated with them. The operator’s liability under each nuclear incident is mentioned in the section as follows:

- In respect of nuclear reactors having thermal power below 10 Megawatt (MW), rupees one thousand five hundred crore;
- In respect of spent fuel reprocessing plants, rupees three hundred crore;
- In respect of research reactors having thermal power below 10 MW, fuel cycle facilities other than spent fuel reprocessing plants and transportation of nuclear materials, rupees one hundred crore.

Section 8: Operator to Maintain Insurance or Financial Securities

- The operator shall, before he begins operation of his nuclear installation, take out an insurance policy or such other financial security or combination of both, covering his liability under Sub-section (2) of Section 6, in such manner as may be prescribed. The operator shall from time to time renew the insurance policy or other financial security referred to in Sub-section (1), before the expiry of the period of validity thereof.

The operator shall, before he begins operation of his nuclear installation, take out an insurance policy or such other financial security or combination of both, covering his liability under Sub-section (2) of Section 6, in such manner as may be prescribed.

- The provisions of Sub-sections (1) and (2) shall not apply to a nuclear installation owned by the central government.

Section 9: Compensation for Nuclear Damage and its Adjudication

- Whoever suffers nuclear damage shall be entitled to claim compensation in accordance with provisions of this Act.
- For the purpose of adjudicating upon claims for compensation in respect of nuclear damage, the central government shall, by notification, appoint one or more claims commissioners for such area, as may be specified in that notification.

Section 12: Adjudication Procedure and Powers of Claims Commissioner

- For the purposes of adjudication of claims under this Act, the claims commissioner shall follow such procedure as may be prescribed.
- For the purpose of holding an inquiry, the claims commissioner may associate with him such persons having expertise in the nuclear field or such other persons and in such manner as may be prescribed.
- Where any person is associated under Sub-section (2), he shall be paid such remuneration, fee or allowance, as may be prescribed.
- The claims commissioner shall, for the purposes of discharging his functions under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:
 - (a) summoning and enforcing the attendance of any person and examining him on oath;
 - (b) discovery and production of documents;
 - (c) receiving evidence on affidavits;
 - (d) requisitioning any public record or copies thereof from any court or office;
 - (e) issuing of commission for the examination of any witness;
 - (f) any other matter which may be prescribed.

- The claims commissioner shall be deemed to be a civil court for the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

Section 17: Operator's Right of Recourse

The operator of the nuclear installation, after paying the compensation for nuclear damage in accordance with Section 6, shall have a right of recourse where:

- Such right is expressly provided for in a contract in writing;
- 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;
- The nuclear incident has resulted from the act of commission or omission of an individual done with the intent to cause nuclear damage.
- Rule 24 of the CLND Rules explains that 'supplier' shall include a person who:
 - (i) manufactures and supplies, either directly or through an agent, a system, equipment or component or builds a structure on the basis of functional specification; or
 - (ii) provides build to print or detailed design specifications to a vendor for manufacturing a system, equipment or component or building a structure and is responsible to the operator for design and quality assurance; or
 - (iii) provides quality assurance or design services.

The supplier may not always be a foreign company; there may be domestic suppliers who fulfil the above criteria and, in some cases, the operator (NPCIL) itself may be a supplier as it provides build to print or detailed design specifications to a vendor.²²

22. "Frequently Asked Questions and Answers on Civil Liability for Nuclear Damage Act 2010 and Related Issues", Ministry of External Affairs, February 8, 2015, https://www.mea.gov.in/pressreleases.htm?dtl/24766/Frequently_Asked_Questions_and_Answers_on_Civil_Liability_for_Nuclear_Damage_Act_2010_and_related_issues. Accessed on July 3, 2023.

Section 35: Exclusion of Jurisdiction of Civil Courts

Save as otherwise provided in Section 46, no civil court (except the Supreme Court and High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) shall have jurisdiction to entertain any suit or proceedings in respect of any matter which the claims commissioner or the commission, as the case may be, is empowered to adjudicate under this Act and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

Section 46: Act in Addition to Any Other Law

The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt the operator from any proceeding which might, apart from this Act, be instituted against this operator.²³

HOW LEGISLATION IS POSING A CHALLENGE

Section 4 of the Act discusses placing strict no-fault liability on the operator. While this principle finds acceptance in almost all nations with nuclear liability laws, the Indian legislation has received criticism. This arises particularly because, in addition to the operator's 'strict no-fault' liability, an exception is also outlined in Section 17 of the Act, highlighting the 'operator's right to recourse'. Even though Section 17 is designed as an enabling provision rather than a substantial one, it generates debate in this context.²⁴

In Section 17(b) of CLNDA, it is stipulated that the operator retains a 'right to recourse' when the nuclear incident has occurred as a result of an action by the suppliers or their employees, encompassing instances such as the provision of equipment or material with patent or latent defects or

23. "Civil Liability for Nuclear Damages Act 2010", *Dashboard Legislative Government*, <https://iddashboard.legislative.gov.in/actsofparliamentfromtheyear/civil-liability-nuclear-damage-act-2010>. Accessed on July 2, 2023.

24. n. 22.

sub-standard services. Essentially, this assigns liability to the suppliers. Consequently, within the Indian context, this provision has led to a lack of motivation among numerous private entities and foreign countries to engage in active collaboration with India within the nuclear energy sector.²⁵

Due to the uncertainty in comprehending the different parts of the Act, the central government utilised its authority outlined in Section 48 of the Act, which pertains to ‘power to make rules’, to formulate the Civil Liability for Nuclear Damage (CLND) Rules in 2011.

Here the obstacle is such that Rule 24 within the CLND Rules of 2011 addresses ‘product liability’ in conjunction with Section 17(b) of the Act. Conversely, Section 17(a) of the Act specifies that the ‘right to recourse’ is applicable in situations explicitly mentioned in the contract. This indicates that once the specified duration elapses, the supplier’s liability would cease. Although ‘Rule 24’ offers a clearer explanation of Section 17, there is a significant possibility of misinterpretation due to potential disagreements between the operators and suppliers.

Additionally, confusion arises from the usage of the term “first licence period” in Rule 24(2), which is presently established at five years. If the intention is to limit Section 17(b) to a period of five years from the commencement of the first licence, it remains uncertain how the interval from the supply date to the initiation of the first licence is covered. If the supply is insured for a cumulative period of five years, it may be deemed inadequate.²⁶

Moreover, both domestic and foreign suppliers have expressed apprehension regarding the expansive reach of Section 46. As outlined in Section 46 of CLNDA, “the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt the operator from any proceeding which might be instituted against such operator apart from this Act.” This establishes an extensive liability for the supplier, particularly in situations

25. n. 23.

26. “CLND Rules”, 2011, Parliament of India, Lok Sabha Digital Library, https://eparlib.nic.in/handle/123456789/64840?view_type=search. Accessed on July 17, 2023.

where an operator exercises its right to recourse under Section 17 of CLNDA. This provision has led to hesitancy among countries to engage in nuclear cooperation agreements with India.²⁷

The Act faced a legal challenge in 2011, specifically in the case of *Common Cause & Ors V. Union of India* (Civil) No. 464 of 2011, which was presented before the Supreme Court of India. The petitioners contested the Act on similar grounds, contending that it infringes upon the 'right to life', the 'polluter pays principle', and the principle of 'absolute liability'. These principles were acknowledged components of land laws under Article 21 of the Indian Constitution.²⁸

This was not the only occasion where CLNDA was subjected to legal scrutiny. In the case of *Yash Thomas Manully and Ors V. Union of India*, the Act was challenged primarily based on two main issues. The first concern centred around the autonomy of the claim's commissioner and the Nuclear Damage Claims Commission. The petitioners argued that the provision bestowed excessive power upon the central government, potentially compromising the independence of the judiciary. However, the High Court dismissed the petitioner's arguments, affirming that a claims commissioner, upon appointment, fulfils a statutory role and is expected to execute the statutory responsibilities in accordance with the law. The court stated that it cannot be assumed that the claims commissioner would operate at the direction of the central government.

Within the same case, Section 35 of the CLNDA, which excludes the jurisdiction of civil courts, was also challenged. The petitioners contended that this provision curtailed their legitimate right to approach civil courts by restricting the jurisdiction.²⁹

27. n. 23.

28. "Common Cause vs Union of India", *India Kanoon*, September 8, 2021, https://www.commoncause.in/uploadimage/case/1638425158nuclear_Petition.pdf. Accessed on July 17, 2023.

29. "Yash Thomas Mannully vs Union of India", *India Kanoon*, October 21, 2011, <https://indiankanoon.org/doc/105269224/>. Accessed on July 17, 2023.

THE WAY FORWARD

For years now, CLNDA has been a roadblock to India's nuclear ambitions, especially around the provision of supplier's liability. It is necessary that the Act get its amendments such that it serves the purpose of not just winning the public's confidence but also gives a kick-start to India's nuclear programmes in collaboration with other nations. The Indo-US and Indo-French deals serve as examples of the potential that India as a country holds. As far as the Indo-US nuclear deal is concerned, no claims were made in terms of amending CLNDA.³⁰ After the developments made in the Indo-France deal in 2023, as discussed in the paper, talks are ongoing on resolving the liability issues between both nations.³¹ Given the legal impediments posed by the Act, it is necessary that it is made such that it fits all parties alike in case of a collaboration.

In order for suppliers to have some relief over the liability clause in Section 17 of CLNDA, the Indian government came up with the Nuclear Insurance Pool. This is a risk transfer mechanism developed by the General Insurance Corporation of India and four other Public Sector Undertakings (PSUs), that would contribute a total capacity of Rs 1,500 crore. The government will contribute the remaining capacity in stages. The pool will cover the risks of the nuclear operator's obligation under Section 6(2) of CLNDA and the suppliers' liabilities under Section 17 of the Act. The pool intends to implement three types of policies, including a unique suppliers' contingency policy for non-turnkey providers. Instead of seeing each other as litigious adversaries, operators and suppliers will regard each other as partners managing a risk together.³²

It is necessary that the Act get its amendments such that it serves the purpose of not just winning the public's confidence but also gives a kick-start to India's nuclear programmes in collaboration with other nations.

30. n. 22.

31. Haider, n. 17.

32. n. 22.

As far as challenges are concerned around the wide scope of Section 46 of CLNDA, the Act assigns sole legal duty for nuclear damage to the operator, and Section 46 does not offer a foundation for pursuing claims for compensation for nuclear damage under other Acts. The fact that this clause applies only to the operator and not to the supplier is verified by the Parliamentary debates held at the time this Act was passed.³³ The amount of liability as given in Chapter 5 of the CLNDA Rules 2011, under '*Explanation 2*' provides that, "For the removal of doubts, it is clarified that an operator claim under this rule shall in no case exceed the actual amount of compensation paid by him up to the date of filing such claim".³⁴

The case of Thomas Manully V. Union of India involved a challenge to the legitimacy of Section 35 of CLNDA, which excludes the jurisdiction of civil courts. The argument put forth was that this section impeded the legitimate right to approach civil courts by limiting their jurisdiction. The petitioner's concerns were addressed by referring to the content of the Act itself. Section 35 of the Act explicitly stipulates that the jurisdiction of civil courts will be waived in situations where the matter can be resolved by the claims commissioner or the nuclear damage claims commission, both of whom possess the authority to adjudicate under the provisions of the Act.³⁵

It is peculiar to note that the Act itself has a remedy to curb most of the problems prompted by it. Section 49 of the Act gives the central government the *power to remove difficulties*. Sub-Section 1 of Section 49 states that "*if any difficulty arises in giving effect to the provisions of this Act, the central government, by order published in the Official Gazette, makes such provisions, not inconsistent with the provisions of this Act, as appear to be necessary or expedient for removing the difficulty*". However, the section also states that no order shall be made under this section after three years from the commencement of this Act. This again leads to confusion in understanding whether the section can be put to action in the current period or not. Sub-section (2) of Section 49 states, "*Every order made under this section shall, as soon as may be after it is made, be*

33. Ibid.

34. n. 26.

35. n. 29.

laid before each house of the Parliament". Even though the scope of this section is yet to be tested, some amendments to Section 49 can be progressive towards an international collaboration and with public and private entities for enhancement of India's nuclear sector. This could be in terms of removing the expiration period and refining the prescribed process of making an order and will help remove the roadblocks coming in its way.³⁶

Modifying the liability law in the aftermath of Bhopal and the Fukushima disaster will be politically difficult, but is possible. The subsequent approach is to maintain the letter of the legislation while subverting its meaning. It is worth noting here that NPCIL or the Department of Atomic Energy is unlikely to simply withdraw the right of recourse from a contract. The choice must be made at the political level.³⁷

According to media sources, the Niti Aayog has proposed modifications to the Atomic Energy Act of 1962 in order to allow foreign investment in the country's nuclear power industry and to encourage more engagement by indigenous private enterprises. If private investment materialises, India may be able to meet its nuclear power capacity ambitions. However, how the basic mismatch between Indian civil liability law and international treaties is handled remains to be seen.³⁸

36. n. 23.

37. Amit Bhandari and Kunal Kulkarni, "India's Nuclear Liability Unchanged", Gateway House, February 17, 2016, <https://www.gatewayhouse.in/indias-nuclear-liability-stand-unchanged/>. Accessed on August 6, 2023.

38. Lydia Powell, Akhilesh Sati, Vinod Kumar Tomar, "India's Targets Nuclear Energy Moving Closer", Observer Research Foundation, May 18, 2023, <https://www.orfonline.org/expert-speak/indias-targets-for-nuclear-energy-moving-closer/>. Accessed on August 5, 2023.

