



The future of nuclear power in India: a question of liability law

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In 2008, as a result of a joint Indo-US agreement on civil nuclear cooperation, India gained access to the Nuclear Suppliers' Group, allowing it to access civilian nuclear technology and fuel from other countries despite not being party to the Non Proliferation Treaty (NPT). Following this, in 2011 India announced ambitious plans to expand its installed nuclear power generation capacity to 63 Gigawatts (GW) (out of over 800 GW) by 2032 through civil nuclear trade. However, several years on, much of this envisaged trade and investment has yet to come to fruition. Nuclear power remains on the agenda; India's new government (elected in May 2014) urged the Department of Atomic Energy to triple nuclear power generation capacity from the current 5.7 GW (out of a total installed capacity of over 200 GW) to 17 GW by 2024. In the longer term, India's Atomic Energy Commission expects a far more ambitious 500 GW of nuclear power capacity to be in place by 2060. However, the quantum of domestic and foreign investments required to achieve these targets has remained elusive. This has largely been put down to the passage into law of the Civil Liability for Nuclear Damage Act, 2010 ('the Act').

The Act, which sets up a specialized compensation mechanism for victims of nuclear incidents, contains provisions arguably inconsistent with India's international obligations. Additionally, it has been held to be excessively onerous on the suppliers of nuclear equipment and materials. Two specific provisions are particularly contentious:

- Section 17(b) which holds suppliers liable for recourse when a nuclear incident results from either a patent or a latent defect in the equipment or material supplied, or as a result of the supply of substandard services; and

- Section 46 which arguably allows suppliers to remain liable under regular provisions of tort law and other general legislation despite having fulfilled their liabilities under this Act.

This article explores these two issues and argues for a legislative re-alignment that ensures nuclear safety while incentivizing participation in the nuclear industry. Though several other issues are relevant for operationalizing the Act, specifically the establishment of the India Nuclear Insurance Pool, recently announced by the Government of India for insuring operator and supplier liability, they are incidental to the core legal concerns that currently impair the growth of nuclear energy in India, and are consequently not dealt with in this article.

Recourse liability of suppliers

Section 17(b) of the Act resulted from a protracted consultative process in Parliament. With India marking the twenty-fifth anniversary of the 'Bhopal Gas Tragedy' – arguably its worst industrial accident – at the time the Bill was being debated, the demand to hold all suppliers, especially foreign companies, strictly liable weighed strongly with parliamentarians. At the same time, the Convention on Supplementary Compensation for Nuclear Damage, 1997 (CSC) – a multilateral treaty that provides a pool of funds to which resort can be taken by Contracting Parties in the event of a nuclear incident – which the Government of India had expressed an intention to sign, contains extremely circumscribed provisions on recourse to suppliers. Article 10 of the Annex to the CSC allows recourse to suppliers in the event of a nuclear incident if it is either provided for by contract or if the damage is caused by an act or omission of an individual with intent to cause damage. A precondition for ratifying the CSC is the

need to have a domestic legislation in compliance with the Annex.

Faced with divergent pulls, the Parliament arrived at Section 17(b) as a workable compromise solution. Thus while Section 17(b) holds suppliers liable for both patent and latent defects in equipment or materials supplied, or for substandard services, there is no liability for negligence or wilful defects. A key principled argument justifies this formulation – it is the public policy of India to ensure that those at fault are held liable for their actions. If the supplier thus provides defective equipment or material, insulating him from liability would not only be unprincipled, but also fail to provide adequate incentives for the supplier to ensure safety.

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However, two key countervailing arguments may be raised – *first*, the fault-based provision on recourse liability leads to the pyramiding of insurance costs and a consequent rise in the costs of nuclear energy. This is because if every supplier has to take out insurance in order to cover himself in the event that a defective part causes nuclear damage and passes the same (or some portion thereof) to the operator, who in turn, passes it on to the consumer, nuclear energy could become unaffordable and consequently non-competitive relative to other forms of energy. *Secondly*, the incorporation of such a provision is inconsistent with Article 10 of the Annex to the CSC and other internationally accepted principles of civil nuclear liability (in the earlier Paris and Vienna Conventions) though the Government of India believes otherwise.

Whether indeed the provision is inconsistent with international principles is a complex question of international law that must be enquired into elsewhere. However, as far as the former issue of pyramiding insurance is concerned, the government, cognizant of the criticism, introduced Rule 24 in the Civil Liability for Nuclear Damage Rules, 2011 to address the situation. Rule 24 provides that it will be a standard term in the supply contract that recourse liability will be limited to the duration of product liability of the equipment supplied, or the duration of the initial licence issued under the Atomic Energy (Radiation and Protection) Rules, 2004 (five years), whichever is longer. At the same time, it will be limited in amount to the extent of operator's liability or to the value of the contract itself, whichever is less.

This rule which seeks to limit liability for suppliers is *prima facie* sensible. However, two caveats are relevant: first, there has been no evidence-based study of the extent to which the price of nuclear energy will increase if suppliers have additional recourse liability foisted on them. Given that the maximum amount of liability that a supplier will, in any event, be liable for is Rs1500 crore or US\$250 million (since that is the cap on liability on the operator which the supplier may have to bear) it will be essential to marshal evidence to determine the actual rise in price of nuclear energy as a consequence. This will be particularly useful in determining if a one-size-fits-all rule should be in place for suppliers based on the value of their contracts, irrespective of the nature or significance of the equipment or material supplied.

Second, the limitation of recourse liability in this manner, through a rule, raises serious issues of administrative law. In India, while delegated legislation (rule-making) is permitted, there are two principles circumscribing it:

- an essential legislative function cannot be delegated (vice of excessive delegation),
- the rule cannot go beyond the statute from which it derives its legitimacy (doctrine of *ultra vires*).

Rule 24 prescribes a limitation in liability and time that is not contained in the statute. Though it is formulated as a standard term in any supply contract, the terms themselves are contrary to Section 17(b) of the Act which prescribes no restrictions on recourse liability on suppliers. Thus the Rule is liable to be struck down as illegal by a court of law for violating basic principles of administrative law; further, in pursuance of the said rule, any contract might also plausibly be voided for being against public policy, since it runs contrary to a statutory liability that a supplier must bear. Greater thought is necessary to incorporate the practically relevant limitations on supplier liability in a legally justified manner.

Concurrent liability under other laws

The Act is envisaged as a special mechanism for speedy compensation for victims of a nuclear incident. By incorporating the principle of legal channelling of liability that channels all liability to the operator, irrespective of fault, the Act seeks to ensure quick compensation for victims without getting entangled in complex legal and evidentiary issues. It should be only natural that, given the existence of such a special mechanism, a victim's right to claim compensation under other legislations or provisions of law would be barred. This is especially so, since there is no envisaged limit on the total compensation that can be claimed by a victim under this Act. While there are caps on the liability of the operator and the total liability in respect of a nuclear incident, it is clearly provided that for claims over and above the latter, the Central Government shall take necessary measures for paying compensation.

However, Section 46 of the Act states that this Act shall be in addition to, and not in derogation of, other laws in force, and nothing contained in the Act shall exempt the operator from any other proceedings under other laws. A conjunctive reading of the two parts of Section 46 suggests that provisions of other laws governing compensation would continue to be applicable and operators may be held liable under any of those provisions. This would include criminal liability, which in any event cannot be excluded under this Act.

However, a disjunctive reading of the two parts – a reading used by several foreign suppliers – suggests that other laws pertaining to compensation continue to remain applicable *in totality*. This means that the victim of a nuclear incident can proceed against a faulty supplier as a result of whose supply he suffered damage. There is nothing in the Act which prevents such action. On the contrary, the second part of Section 46 (which discusses only concurrent liability of operators) can be interpreted as being silent on, and hence not governing, questions of concurrent liability of suppliers. This leaves suppliers (as well as operators) open to potentially unquantifiable amounts of liability.

That liability should be capped, and consequently quantifiable, for the purpose of taking insurance is a platitude. The Government of India, at the time of the recent visit of President Obama has committed to issuing a 'memorandum of law' clarifying its position. Such a clarification is welcome since section 46, as per the disjunctive reading above, creates considerable uncertainty as to the sanctity of liability caps under the Act. This is an insurmountable deal-breaker, as both suppliers and operators are open to unquantified amounts of liability. Given the fact that operators of nuclear plants in India are owned and controlled by the Government of India, and the government is the last



resort for compensation, this problem is particularly acute for suppliers who, in the absence of this provision, would have their liability solely determined under this Act. Further, such a provision which was passed without much discussion in Parliament, would defeat the *raison d'être* of the Act itself, which is intended as a special mechanism to deal with questions of nuclear liability. An amendment to this provision, underlining the overriding nature of this Act and allowing the concurrent continuance of criminal liability proceedings alone, thus needs to be considered.

Conclusion

Nuclear power presents a significant opportunity to provide a cheap and low-carbon energy source for India

– specifically in comparison to coal. However, there is currently a mismatch between India's ambitious plans for nuclear energy and the cautious drafting of its legislative and regulatory framework. If the targets in the former have to be met, the conceptualization of the latter will have to be pragmatic, without compromising on safety. A failure to do so has meant that in the last four years, since the coming into effect of the Act, the expected bilateral deals pertaining to nuclear power co-operation have not materialized. This is particularly the case with companies from the USA and Japan, which do not enjoy a sovereign guarantee from their respective governments. If this situation is to change, it is essential that the liability legislation is clarified or amended, as the case may be, to ensure that nuclear power provides

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a safe and viable source of energy to meet India's burgeoning energy requirements. President Obama's recent visit to Delhi resulted in a renewal of cooperation to resolve this issue for US nuclear suppliers. The orientation of a general solution with particular suppliers in mind raises several concerns. Further, the manner of resolution even for US suppliers leaves much of the detail to be worked out through contractual discussions. Relevant legislative clarification and amendments are necessary if investments in nuclear power have to pick up.

