



Frequently Asked Questions and Answers on Civil Liability for Nuclear Damage Act 2010 and related issues

February 08, 2015

Q1. What is the understanding reached with the United States on January 25, 2015 during the visit of President Obama to India?

Ans. India and the United States have reached an understanding on the issues related to civil nuclear liability and finalized the text of the Administrative Arrangement to implement the September 2008 bilateral 123 Agreement. This will allow us to move towards commercial negotiations on setting up reactors with international collaboration in India and realize the significant economic and clean energy potential of the civil nuclear understanding of 2005-2008.

Q2. How was this understanding reached?

Ans. It may be recalled that during PM's visit to the U.S. in September 2014, the two leaders reaffirmed their commitment to implement fully the India-U.S. civil nuclear cooperation agreement and established a Contact Group on advancing the implementation of civil nuclear energy cooperation. The Group, comprising representatives from Ministry of External Affairs, Department of Atomic Energy, Nuclear Power Corporation of India Ltd (NPCIL), Ministry of Finance, Ministry of Law & Justice, in addition to the representatives from U.S. Government, also had an interface with the companies – NPCIL on the Indian side and Westinghouse and General Electric on the U.S. side. It met three times in New Delhi (16-17 December 2014), Vienna (6-7 January 2015) and London (January 21-22, 2015). Based on these discussions, an understanding was reached with the U.S. on the two outstanding issues on civil nuclear cooperation, which was confirmed by the leaders on January 25, 2015.

Q3. Has India agreed to amend its Civil Liability for Nuclear Damage Act of 2010 (CLND Act 2010) and the CLND Rules of 2011? If not now, would they be amended in the future?

Ans. There is no proposal to amend the Act or the Rules.

Q4. How have U.S. concerns over the CLND Act then been resolved?

Ans. During the course of the discussions in the Contact Group, using case law and legislative history, the Indian side presented its position concerning the compatibility of the Civil Liability for Nuclear Damage (CLND) Act and the Convention on Supplementary Compensation for Nuclear Damage (CSC). The idea of the India Nuclear Insurance Pool as a part of the overall risk-management scheme for liability was also presented to the U.S. side. Based on the presentations by the Indian side, and the discussion thereon, there is a general understanding that India's CLND law is compatible with the CSC, which India has signed and intends to ratify.

Q5. What is the CSC?

Ans. The objective of the 1997 Convention on Supplementary Compensation for Nuclear Damage (CSC) is to establish a worldwide liability regime and to increase the amount of compensation available to the victims of nuclear accidents. A State which is a party to either the 1963 Vienna Convention or the 1960 Paris Convention could become a party to the CSC. A State which is not a party to either of these conventions could also become a party to the CSC if its national law on nuclear liability is in compliance with the provision of the CSC and its Annex, which is an integral part of the CSC. India not being party to the Vienna or the Paris Conventions signed the CSC on 29 October 2010 on the basis of its national law namely the CLND Act.

Q6. Is India's CLND Act compatible with the CSC?

Ans. The provisions of the CLND Act are broadly in conformity with the CSC and its Annex in terms of channeling the strict/absolute legal liability to the operator, the limitations of the liability in amount and time, liability cover by insurance or financial security, definitions of nuclear installation, damage, etc. In fact, the CLND Act provides the basis for India joining an appropriate international liability regime such as the CSC. Article XVIII of CSC requires that the national law of a Contracting Party that is not a Party to either the Vienna Convention or the Paris Convention has to comply with the provisions of the Annex to this Convention. The CLND Act is compliant with the Annex to the Convention.

Q7. Does the Act channel the liability to the Operator of a nuclear plant as envisaged under CSC?

Ans. Section 4(1) provides that the Operator of the nuclear installation shall be liable for nuclear damage caused by nuclear incident. Further, Section 4(4) provides that the liability of the Operator of the nuclear installation shall be strict and shall be based on the principle of no fault liability. Section 8(1) provides that the Operator shall before he begins operation of his nuclear installation, take out insurance policy or such further financial security covering his liability. All these provisions along with the long title of the Act are clear and ensure that the liability is strict, and channeled to the Operator through a no fault liability regime.

Q8. What about Section 17 and the right of recourse against the supplier in Section 17(b)? Are they not going beyond the Annex to the Convention?

Ans. Section 17 of the Act provides that the operator of the nuclear installation, after paying the compensation for nuclear damage in accordance with section 6, shall have the right to recourse where-

- 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 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.

Article 10 of the Annex to the CSC covers situations envisaged in Sections 17(a) and 17(c); Section 17 (b) is ostensibly in addition to situations identified for the right of recourse provided in Article 10 of the Annex to the CSC. However, the situations identified in Section 17(b) relate to actions and matters such as product liability stipulations/conditions or service contracts. These are ordinarily part of a contract between the operator and the supplier. This situation is not novel but is rather a normal element of a contract. Thus this provision is to be read along with/in the context of the relevant clause in the contract between the operator and supplier on product liability. It is open for the operator and the supplier to agree on the terms of their contract relying on the applicable law. The parties to a contract generally elaborate and specify the extent of their obligations pursuant to warranty and indemnity clauses that are normally part of such contracts.

Article 10(a) of the CSC Annex does not restrict in any manner the contents of the contract between the operator and the supplier including the basis for recourse agreed by the operator and supplier. Therefore, in view of the above, in so far as the reference to the supplier in Section 17(b) is concerned, it would be in conformity with and not in contradiction of Article 10(a) of the CSC Annex. Its operationalization will be through contract conditions agreed to by the operator and the supplier.

Q9. Does Section 17 establish a mandatory statutory right of recourse?

Ans. Section 17 states that the operator shall have a right of recourse. While it provides a substantive right to the operator, it is not a mandatory but an enabling provision. In other words it permits but does not require an operator to include in the contract or exercise a right of recourse. However, even though there is no mandatory legal requirement under the CLND Act to provide for a right of recourse in a contract, there may be policy reasons for having a risk sharing mechanism including a right of recourse. As a matter of policy, NPCIL, which is a public sector undertaking, would insist that the

nuclear supply contracts contain provisions that provide for a right of recourse consistent with Rule 24 of CLND Rules of 2011. Article 10 of the CSC Annex does not specify what position either the operator or the supplier can take in contract negotiations. In this regard, the India Nuclear Insurance Pool has been instituted to facilitate negotiations between the operator and the supplier concerning a right of recourse by providing a source of funds through a market based mechanism to compensate third parties for nuclear damage. It would enable the suppliers to seek insurance to cover the risk of invocation of recourse against them.

Q10. Who is the ‘supplier’? Is the supplier always a foreign company?

Ans. 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 fulfill 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.

Q11. Does Section 46 permit claims for compensation for nuclear damage to be brought under statutes other than the CLND Act?

Ans. Concerns over the broad scope of Section 46 have been raised by suppliers, both domestic and foreign. Section 46 of the CLND Act provides that "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 such operator". The language in section 46 of CLND Act 2010 is similar to such language in several other legislations such as Telecom Regulatory Authority Act, Electricity Act, Securities and Exchange Board of India (SEBI) Act, Insurance Commission Act. Such language is provided routinely to underline that other relevant laws continue to be operable in their respective domains.

Q12. Does Section 46 extend to suppliers in violation of the CSC?

Ans. No. The CLND Act channels all legal liability for nuclear damage exclusively to the operator and Section 46 does not provide a basis for bringing claims for compensation for nuclear damage under other Acts. That this section applies exclusively to the operator and does not extend to the

supplier is confirmed by the Parliamentary debates at the time of the adoption of this Act. It may be noted that the CLND Bill was adopted by a vote. During the course of the vote on various clauses of the Bill, in the Rajya Sabha two amendments were moved for clause 46 that finally became Section 46 of the CLND Act that inter-alia sought to include suppliers in this provision. Both those amendments were negatived. A provision that was expressly excluded from the statute cannot be read into the statute by interpretation. It is well-settled principle of law that every statute is to be interpreted in accordance with the intention of the legislature or maker of the Statute (M/s. Turtuf Safety Glass Industries V Commissioner of Sales Tax U.P., 2007 (9) SCALE 610, and State of Kerala & Anr V P.V. Neelakandan Nair & Ors, 2005 (5) SCALE 424).

Q13. Does Section 46 allow victims to go to foreign courts against the operator or the supplier?

Ans. Section 46 exclusively covers the remedies that are available against the operator. It does not exempt the operator from any other proceedings instituted against him, apart from this Act, nor derogates from any other law in force in India. The provision "in addition to and not in derogation of" has to be given its normal plain meaning. Section 46 does not affect the applicability of other laws. Therefore it does not exempt the operator from application of other laws covering matters other than the civil liability for nuclear damage. At the same time it does not create the grounds for victims to move foreign courts. In fact that would be against the basic intent of the law to provide a domestic legal framework for victims of nuclear damage to seek compensation. The fact that a specific amendment to introduce the jurisdiction of foreign courts was negatived during the adoption of the CLND Bill buttresses this interpretation.

Q14. How will the proposed insurance pool operate for operators and suppliers?

Ans. The India Nuclear Insurance Pool is a risk transfer mechanism formed by GIC Re and 4 other PSUs who will together contribute a capacity of Rs 750 crores out of a total of Rs 1500 crores. The balance capacity will be contributed by the Government on a tapering basis. The pool will cover the risks of the liability of the nuclear operator under Section 6(2) of the CLND Act and of the suppliers under Section 17 of the Act. The Pool envisages three types of policies, including a special suppliers' contingency policy for suppliers other than turn key suppliers. Operators and suppliers instead of seeing each other as litigating adversaries will see each other as partners managing a risk together. This is as important for Indian suppliers as it is for US or other suppliers. An international workshop will be held in India to exchange information on international experience with the 26 insurance pools operating around the world in countries such as France, Russia, South Africa and the U.S.

Q15. What are the kind of insurance policies and premiums envisaged under the Pool?

Ans. The Pool covers risks pertaining to the liability of the nuclear operator under Section 6(2) of the CLND Act as well as the liability of the suppliers under Section 17. Three types of policies are envisaged: a Tier 1 policy for operators; a Tier 2 policy for turn key suppliers and a Tier 3 policy for suppliers other than turn key suppliers. The pricing of premiums will depend on factors such as risk probability, possible severity of damage and exposure to people and property around nuclear installations. GIC Re, the Pool Administrator, is engaged with NPCIL and others to work out the premiums based on risk appraisal. To assist this exercise, a Probabilistic Safety Assessment based study has been carried out by DAE. The scheme is scientific, market based, and benchmarked to international best practices innovated to suit the Indian circumstances.

Q16. Wouldn't this burden the taxpayer and raise costs of nuclear power?

Ans. It should be understood that there is no extra burden on the taxpayer or the Government. The CLND Act already requires NPCIL (Operator) to maintain a financial security to cover its maximum liability for civil nuclear damage (Rs 1500 crores). Currently, NPCIL takes out a bank guarantee for this amount against which it pays an annual fee. With the India Nuclear Insurance Pool (INIP), a market based international best practice will be followed. The NPCIL will take out insurance under the Pool for the same amount and just as it pays an annual fee now it will pay an annual insurance premium to the Pool. The Government will indeed make available Rs 750 crores to the Insurance Pool for the first few years till the insurance companies are able to maintain it on their own. However, the Government will earn a proportionate share of the premium on this sum, which will be utilized only in case of a nuclear accident. The impact on the cost of power plants of the premium payments by operator and suppliers is expected to be minimal. The international experience of 26 insurance pools is that the operators pay only a very small fraction of the total cost of the plants.

Q17. How much compensation is payable under the CLND Act?

Ans. Section 6(1) of the CLND Act presently prescribes that the maximum amount of liability in respect of each nuclear incident shall be the rupee equivalent of three hundred million Special Drawing Rights (SDRs). As the current value of 1 SDR is about Rs 87, three hundred million SDRs are equivalent to about Rs 2610 crores. Section 6(2) of the Act lays down that the operator's maximum liability shall be Rs 1500 crore. In case the total liability exceeds Rs 1500 crores, as per Section 7 (1) (a) of the CLND Act, this gap of Rs 1110 crores will be bridged by the Central Government. Beyond Rs 2610 crores, India will be able to access international funds under the CSC once it is a party to that Convention.

Section 7 (2) of the CLND Act provides that the Central Government may establish a "Nuclear Liability Fund" by charging such amount of levy from the operators, in such manner, as may be prescribed. The constitution of a Nuclear Liability Fund has been under consideration for some time. Such a Fund is proposed to be built up over 10 years by levying a small charge on the operators based on the power generated from existing and new nuclear plants. This is not expected to affect the consumer's interests.

Q18. Could operators and suppliers be asked to pay more compensation in the future on existing contracts than currently provided under the law?

Ans. As regards the question of possible enhancement of the amount of compensation in the Act in future and its effect on recourse against suppliers with respect to existing contracts, there is well established jurisprudence that a change in law cannot alter the terms of an existing contract made under the then extant law. A retrospective law which affects the substantive vested rights of a Party under a contract would not be sustainable in a court of law. In *M/s Purbanchal Cables & Conductors Pvt. Ltd. V Assam State Electricity Boards & Another*, [2012] 6 S.C.R. 905, the Supreme Court held that though the legislature can make laws with retrospective effect, the test is that it should not take away vested rights or impose new burdens or impair existing obligations.

Q19. What are the next steps?

Ans. It will be now up to the companies to follow up with their own negotiations and come up with viable techno-commercial offers and contracts consistent with our law and our practice so that reactors built with international collaboration can start contributing to strengthening India's energy security and India's clean energy options.

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